

## APPENDIX — A-1

On November 6, 2003, Johnson filed a petition for review of the Initial Decision stating that she wished to reopen her case. The Board denied Johnson's petition for review, vacated the Initial Decision, and dismissed her appeal for lack of jurisdiction in its Final Decision. The Board noted that its jurisdiction was limited to "employees" as defined in 5 U.S.C. § 7511(a)(1) and that Johnson, as an employee of the Judicial Branch of the government, did not meet the definition of "employee" under that section.

We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(9).

### DISCUSSION

#### A. Standard of Review

Pursuant to 5 U.S.C. § 7703(c), this court must affirm the Board's decision unless it is: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (2) obtained without procedures required by law, rule or regulation having been followed; or (3) unsupported by substantial evidence. Chase-Baker v. Dep't of Justice, 198 F.3d 843, 845 (Fed. Cir. 1999). Whether the Board has jurisdiction over an appeal is a question of law, which we

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review de novo. Hayes v. U.S. Postal Serv., 390 F.3d 1373, 1376 (Fed. Cir. 2004). The petitioner bears the burden of establishing reversible error in reviewing a decision of an administrative agency such as the Board. Harris v. Dep't of Veterans Affairs, 142 F.3d 1463, 1467 (Fed. Cir. 1998).

### B. Analysis

The burden of establishing jurisdiction is placed by regulation on the appellant. 5 C.F.R. § 1201.56(a)(2)(I) (2003); McCormick v. Dep't of the Air Force, 307 F.3d 1339, 1340 (Fed. Cir. 2002). The Board's jurisdiction is strictly limited to that provided by statute rule, or regulation. 5 U.S.C. § 7701(a) (2000); Forest v. Merit Sys. Prot. Bd. 47 F.3d 409, 410 (Fed. Cir. 1995). The Board has jurisdiction under 5 U.S.C. § 7513 to hear appeals from removals. The Board's jurisdiction, however, is limited, and "with respect to adverse actions under section 7513, that jurisdiction only encompasses appeals by 'employees' as defined in 5 U.S.C. § 7511(a)(1)." Hartman v. Merit Sys. Prot. Bd., 77 F.3d 1378 1380 (Fed. Cir. 1996).



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The Board correctly identified three ways to meet the statutory definition of "employee" as set forth by 5 U.S.C. § 7511(a)(1). Section 7511(a)(1) defines an employee, in relevant part, as: (1) an individual in the competitive service who has fulfilled the requisite length of service; (2) a preference eligible individual in the excepted service who has completed one year of current continuous service in the same or similar position in an Executive agency; the United States Postal Service, or the Postal Rate Commission; and (3) a nonpreference individual in the excepted service who has completed two years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to two years or less. 5 U.S.C. § 7511(a)(1)(A)-(C) (2000).

Johnson contends that the Board erred in defining and interpreting "competitive service." We find no error in the Board's interpretation of "competitive service." The term "competitive service" is defined in 5 U.S.C. § 2102 as consisting of, inter alia, "civil service positions in the executive branch which specifically included in the

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competitive service by statute." Id. § 2102 (a)(2). The petitioner has not cited and we have not found any statute that places her position in the competitive service.

Johnson also contends that the Board erred in interpreting "excepted service." Subject to a few exceptions not relevant here, the "excepted service" consists of all civil service positions in an Executive agency. An Executive agency is defined as an "Executive department, a Government corporation, and an independent establishment." Id. § 105. The Board correctly concluded, and Johnson does not dispute, that she was an employee of the Judicial Branch, and not an employee of an Executive agency of the federal government. Accordingly, we agree with the Board that Johnson does not meet the definition of "employee" on this basis.

Johnson finally contends that, because she alleged that her removal was based on discrimination, her case is a "mixed case" within the Board's jurisdiction under 5 U.S.C. § 7702. For the purpose of determining the Board's jurisdiction, the discrimination claims must be made with

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respect to a personnel action that is otherwise appealable to the Board. Id. § 7702. Hartman, 77 F.3d at 1381. Since the Board lacks jurisdiction over personnel actions affecting employees of the Judicial Branch, the Board lacks jurisdiction to hear Johnson's discrimination claims as well.

Accordingly, the Board did not err as a matter of law in concluding that it lacked jurisdiction to consider Johnson's petition.

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**UNITED STATES COURT OF APPEALS**

**FOR THE FEDERAL CIRCUIT**

**NOTICE OF ENTRY OF JUDGMENT**

**ACCOMPANIED BY OPINION**

**OPINION FILED AND JUDGMENT**

**ENTERED: 04/06/05**

The attached opinion announcing the judgment of the court in your case was filed and judgment was entered on the date indicated above. The mandate will be issued in due course.

Information is also provided about petitions for rehearing and petitions for rehearing en banc. The questions and answers are those frequently asked and answered by the Clerk's Office.

Costs are taxed against the Petitioner(s) under Rule 39. The party entitled to costs is provided a bill of costs form and an instruction sheet with this notice.

The parties are encouraged to stipulate to the costs. A bill of costs will be presumed correct in the absence of a timely filed objection.

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Costs are payable to the party awarded costs. If costs are awarded to the government, they should be paid to the Treasurer of the United States. Where costs are awarded against the government, payment should be made to the person(s) designated under the governing statutes, the court's orders, and the parties' written settlement agreements. In cases between private parties, payment should be made to counsel for the party awarded costs or, if the party is not represented by counsel, to the party pro se. Payment costs should be sent to the court. Costs should be paid promptly.

If the court also imposed monetary sanctions, they are payable to the opposing party unless the court's opinion provides otherwise. Sanctions should be paid in the same way as costs.

Regarding exhibits and visual aids: Your attention is directed to FRAP 34(g) which states that the clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to

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remove them. (The clerk deems a reasonable time to be 15 days from the date the final mandate is issued).

/s/  
**JAN HORBALY**  
Clerk

cc: **EVELYN L. JOHNSON**  
**CALVIN MORROW**

**JOHNSON V MSPB, 04-3452**  
**MSPB - AT0752030934-I-1**

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**UNITED STATES COURT OF APPEALS**

**FOR THE FEDERAL CIRCUIT**

**NOTICE OF SUBMISSION**

**WITHOUT ORAL ARGUMENT**

**04-3452**

**JOHNSON V MSPB**

A review of this case indicates that oral argument is not required and that the appeal may be decided on the briefs without prejudice to full consideration of the issues. This case will be submitted to a panel of judges of the court on April 5, 2005. Because the court has not allotted time for oral argument, nothing concerning this case will take place in open court even though the appeal appears on the court's calendar for that day.

Someone appearing pro se, or counsel for a party, may file a memorandum presenting reasons why oral argument would assist the court or answers to points in an opposing brief that might otherwise have been presented at oral argument, or both. The memorandum, not to exceed 5 pages, may be typewritten on 8 1/2 by 11 inch paper. An original and



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six copies of the memorandum should be filed on or before March 18, 2005. If there are any questions regarding this notice, please contact James Benjamin (202) 312-5526, for MSPB, Court of Federal Claims, or Department of Veterans Affairs appeals, or Linda Purdie (202) 312-5527, for other appeals.

If a request for oral argument is made and granted, the appeal would be scheduled for hearing on the same date that this case is to be submitted to the court, and you will be notified by telephone or mail.

After the appeal has been decided by the panel of judges, you will be sent a copy of the decision by mail. Although appeals are usually decided soon after the submission date, in some instances a longer period is required. In any event, you will be notified promptly.

**FOR THE COURT  
JAN HORBALY  
CLERK**

**February 22, 2005**

**cc: EVELYN L. JOHNSON  
CALVIN MORROW**

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**NOTE:** Pursuant to Fed. Cir. R. 47.6,  
this order is not citable as precedent.  
It is a public order.

**UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT**

**04-3452**

**EVELYN L. JOHNSON,**

**Petitioner,**

**v.**

**MERITS SYSTEMS PROTECTION BOARD**

**Respondent.**

**ON MOTION**

**ORDER**

Evelyn L. Johnson moves without opposition for a 30-day extension of time, until March 11, 2005, to file her reply brief.

Upon consideration thereof,

**IT IS ORDERED THAT:**

The motion is granted.

**FOR THE COURT**

**APPENDIX — 2-A**

FEB - 9 2005

Jan Horbaly/JB  
Clerk

cc: Evelyn L. Johnson  
Calvin Morrow, Esq.

**FILED**  
**U.S. COURT OF APPEALS FOR**  
**THE FEDERAL CIRCUIT**

**FEB 09 2005**

**JAN HORBALY**  
**CLERK**

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NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record.

**United States Court of Appeals  
for the Federal Circuit**

04-3452

EVELYN L. JOHNSON,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

ON MOTION

Before Michel, Chief Judge, BRYSON and PROST,

Circuit Judges.

BRYSON, Circuit Judge.

**ORDER**

Evelyn L. Johnson seeks three-judge review of the court's order reforming the caption to designate the Merit Systems Protection Board as the respondent in place of the Administrative Office of the U.S. Courts. Johnson moves for

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file a reply brief.

Accordingly,

IT IS ORDERED THAT:

(1) Johnson's motion for three-judge review is granted.

(2) Johnson's motion for reconsideration is denied.

(3) Johnson's motion for leave to file a second supplemental brief is denied.

(4) The Board's motion for leave to file its brief out of time is granted.

FOR THE COURT

Jan 26, 2005  
Date

/s/ William C. Bryson  
William C. Bryson  
Circuit Judge

cc: Evelyn L. Johnson  
Calvin Morrow, Esq.

FILED  
U.S. COURT OF APPEALS FOR  
THE FEDERAL CIRCUIT  
JAN HORBALY  
CLERK  
JAN 26, 2005

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**UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT**

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**EVELYN L. JOHNSON,**

**Petitioner,**

**v.**

**MERIT SYSTEMS PROTECTION BOARD,**

**Respondent.**

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**Petition for Review  
from the Merit Sys. Protection Bd.  
in Docket No. AT-0752-03-0934-I-1**

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**PETITIONER'S OBJECTION  
TO RESPONDENT'S MOTION FOR LEAVE  
TO FILE BRIEF OUT OF TIME**

**The Petitioner in the above-referenced matter moves  
the United States Court of Appeals for the Federal Circuit to  
DENY Respondent's (through its counsel) Motion For Leave  
To File Brief Out Of Time. In support of this motion,**

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Petitioner asserts the following:

1. The Court's Order dated November 8, 2004, specifically states that "(5) The Board's Brief, either formal or informal is due within 40 days of the date of the filing of this order." The Board's Brief was due December 18, 2004. The Board filed its informal brief on December 20, 2004, and was rejected by the Court for untimely filing of the Brief. Respondent's Counsel ("Counsel") asserted that "despite reasonable efforts to ensure timely filing," Counsel blamed the courier in the untimely filing of the Brief. Counsel failed to show good cause in the untimely filing of the Board's Brief.

2. Petitioner asserts that Counsel for the Board failed to establish "reasonable efforts to ensure timely filing of the Brief" because Counsel conceded that "[t]he Board's final Brief was put in final form and signed on December 20, 2004, . . . [and that] the package was placed in the Court's night deposit box on December 20, 2004" two days after the filing deadline of December 18, 2004. Petitioner also asserts that Counsel had ample time, 40 days, to file the Brief, but the Brief was not final and not signed until December 20,



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2004.” Petitioner also asserts that while she deals with cancer, its treatments, its side effects, and pro se filings, Petitioner was able to file timely her Brief and supporting documents to the Court.

3. Counsel erred in recommending to the Court to dismiss the complaint for lack of jurisdiction. Respondent’s Motion to Recaption, dated November 9, 2004, states that “[t]he Respondent [Administrative Office of the U.S. Courts] and the Board agree that the MSPB’s dismissal of Ms. Johnson’s appeal for lack of jurisdiction is not a final order or decision on the merits of the underlying Personnel action.” See U.S.C. § 7703(a)(2). The Court’s Order dated November 8, 2004, states that “[b]ecause the Board’s ruling was limited to a jurisdictional determination and did not address the underlying merits pertaining to Johnson’s termination, the Board is the proper respondent in this petition for review.” Furthermore, the Order states that “[t]he employing agency [Administrative Office of the U.S. Courts] is designated as the respondent when the Board reaches the merits of the

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underlying case. See Spruill v. MSPB, 978 F.2d 679 686 (Fed. Cir. 1992).

4. As specifically stated on the Court's Order of November 8, 2004, the Board did not address Petitioner's discrimination allegations, true issues of sets of facts and law, in reaching its decision. Counsel, nonetheless, rehashed the Board's Order of July 12, 2004, and recommended dismissing the appeal for lack of jurisdiction to the Court.

5. As Petitioner discussed point by point her discrimination allegations and factual disputes with supporting documents on her Brief, supplements to her Brief, reply to Respondent's motions, and discussions of relevant facts and law, civil service rules and regulations, and federal employment statutes, Counsel failed to address the merits of those issues on the Board's informal Brief, as specified in the Court's Order.

For the reasons set forth above and in the interest of substantial justice, Petitioner respectfully requests the Court to DENY the Board's Motion For Leave To File Brief Out Of Time, vacate and set aside the Board's recommendation and

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decision, find full merits of Petitioner's entire claim, and  
issue judgment as a matter of law for the Petitioner.

Respectfully submitted,

January 6, 2005

Date

/s/ Evelyn L. Johnson

Evelyn L. Johnson

Pro se Petitioner

6241 S. Skyline Drive

Douglasville, GA 30135

(770) 489-0343

cc: Calvin M. Morrow  
Evelyn L. Johnson

**APPENDIX — 5-A**  
**IN THE UNITED STATES**  
**COURT OF APPEALS**  
**FOR THE FEDERAL CIRCUIT**

NO. 04-3452

EVELYN L. JOHNSON,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

**MOTION FOR LEAVE TO**  
**FILE BRIEF OUT OF TIME**

The respondent Merit Systems Protection Board (Board), by its counsel, respectfully moves the Court for leave to file its brief out of time. The grounds for this motion are set out below.

1. Under the Court's order dated November 8, 2004, the brief for respondent was due December 20, 2004.

2. According to the Court's order of December 23, 2004, the Court received the Board's informal brief, but determined that it was filed untimely, i.e., between December 21-23, 2004.

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3. The Board's brief was put in final form and signed on December 20, 2004.

4. The Board's courier service was notified on December 20, 2004, that there was a package to be picked up for filing with the Court on that day.

5. The courier who picked up the package containing the Board's brief has stated to Board employees that he placed the package in the Court's night deposit box on December 20, 2004.

6. If the Board's brief was untimely filed, it was untimely despite counsel's reasonable efforts to ensure timely filing.

Wherefore, the Board respectfully requests the Court to grant it leave to file its brief out of time.

Respectfully submitted,

December 30, 2004

MARTHA B. SCHNEIDER

General Counsel

/s/CALVIN M. MORROW

Attorney

Office of the General Counsel  
Merit Systems Protection Board  
1615 M Street, NW  
Washington, D.C. 20419-0002  
(202) 653-6772 Ext 1280

**APPENDIX — 6-A**  
**IN THE UNITED STATES**  
**COURT OF APPEALS**  
**FOR THE FEDERAL CIRCUIT**

**NO. 04-3452**

**EVELYN L. JOHNSON,**

**Petitioner,**

**v.**

**MERIT SYSTEMS PROTECTION BOARD,**

**Respondent.**

**RESPONDENT'S INFORMAL BRIEF**

**I. NATURE OF THE CASE.**

The petitioner, Evelyn L. Johnson, seeks review of a final decision of the Merit Systems Protection Board (Board or MSPB) that dismissed for lack of jurisdiction her appeal from the termination of her employment from a position in judicial branch of the federal government. Evelyn L. Johnson v. Admin Office of the U.S. Courts, MSPB Docket No. AT-0752-03-0934-I-1 (Opinion and Order, July 12, 2004). Respondent's Appendix (RA) 1-6.

**II. STATEMENT OF FACTS AND THE COURSE OF**

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### **PROCEEDINGS BELOW:**

The petitioner, Evelyn Johnson, received an excepted appointment to the position of Court Secretary in the Staff Attorneys' Office of the United States Court of Appeals for the Eleventh Circuit effective January 17, 1989. RA 14. Ms. Johnson was subsequently promoted to the position of Human resources Coordinator in the Staff Attorneys' Office effective September 10, 2001. RA 15. On June 20, 2003, the Senior Staff Attorney notified petitioner of her termination from her position effective June 27, 2003, because of unacceptable conduct and unsatisfactory work. RA 16-17.

Ms. Johnson filed an appeal of her termination with the Board on September 9, 2003. Shortly afterward, on October 8, 2003, she informed the Board that she wished to withdraw her appeal. The administrative judge accordingly dismissed petitioner's appeal as withdrawn on October 9, 2003. RA 7-8.

On November 6, 2003, Ms. Johnson filed a petition for review of the initial decision stating that she wished to reopen her case and that the agency misled her concerning



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her rights. Petitioner contended that the Board had jurisdiction over her appeal from her removal for unacceptable performance because she was a nonpreference eligible employee in the excepted service with more than two years of current continuous service. She also argued that the Board's jurisdiction included her claims of discrimination based on race, sex, color, age and national origin. RA 2, 18-19. The agency opposed Ms. Johnson's petition, arguing that the Board lacked jurisdiction because petitioner was an employee of the judicial branch and was therefore not an "employee" entitled to appeal to the Board under 5 U.S.C. § 7511(a). RA 2.

The Board denied Ms. Johnson's petition for review, vacated the initial decision, and dismissed her appeal for lack of jurisdiction. The Board noted that its jurisdiction over removal appeals under 5 U.S.C. § 7513(d) is limited to individuals who meet the definition of "employee" in 5 U.S.C. § 7511(a)(1). RA 3. The Board determined that Ms. Johnson did not meet any of the definitions of an "employee" under that section because the evidence

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showed that she was employed in the judicial branch of the government, a fact that she did not dispute. [Pet.'s Note: analysis was error because under 5 U.S.C. § 7511(a)(1)(C), Petitioner is "an individual in the excepted service (other than preference eligible) (i) who is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service." See 5 U.S.C. § 7511(a)(1)(C)(i). (Appendix F-8). To qualify under section 7511, the Board noted, an individual must be employed in a position in an agency in the executive branch or in a position in a non-executive agency that is specifically included by statute in the competitive service. Although petitioner argued (in later submissions) that her position was in the competitive service, the Board found that none of the statutes that applied to her position specifically placed it in competitive service. [Pet.'s Note: analysis was error. See 5 C.F.R. § 1.2, Appendix F, Tab 8.). The Board therefore concluded that it lacked jurisdiction over petitioner's appeal. RA 4-5.

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1. Has the petitioner ever had another case in this Court, a United States District Court, or in the Equal Employment Opportunity Commission?

Petitioner indicated in her Fed.Cir.R. 15(c) Statement Concerning Discrimination that she filed a discrimination case concerning the same matter in both the U.S. District Court and the Equal Employment Opportunity Commission (EEOC). Under Williams v. Dep't of the Army, 715 F.2d 1485, 1491 (Fed. Cir. 1998) (en banc), Ms. Johnson is not permitted to bifurcate her appeal of her removal between review in this Court and a civil action in district court. However, petitioner's appended explanation appears to indicate that her reference to a district court case is not to a civil action under 5 U.S.C. § 7703(b)(2), but to the role of magistrate judges of the U.S. District Court for the Northern District of Georgia in processing her internal employment dispute resolution complaint filed with her employer, the Eleventh Circuit Court of Appeals. See also Petitioner's Brief (PB) at 2. In addition, petitioner's explanation states that her EEOC filing concerning her removal was dismissed

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for lack of jurisdiction.

Counsel for the respondent is not aware of any other cases filed by petitioner in this Court, a U.S. district court, or the EEOC.

2. Did the MSPB incorrectly decide or fail to take into account any facts?

No. The Board considered the relevant facts, which are not in dispute. [Pet.'s Note: Incorrect, MSPB considered jurisdiction only.]. Ms. Johnson sought to appeal her removal from her employment as a Human Resources Coordinator in the Staff Attorneys' Office of the U.S. Court of Appeals for the Eleventh Circuit, a position in the judicial branch of the federal government. As discussed below, no statute or regulation gives the Board jurisdiction to hear this appeal. [Pet.'s Note: So, judicial employees do not have equal rights protection? The case was brought under Title VII of the CRA of 1964.].

3. Did the MSPB apply the wrong law?

No. The Court's review is limited to determining whether the Board's decision is arbitrary, capricious, an

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abuse of discretion or otherwise not in accordance with the law; obtained without unsupported by substantial evidence. 5 U.S.C. § 7703(c). [Pet.'s Note: Yes, see 5 U.S.C. § 7701 (c)(2), Appendix E.]. The issue of whether the Board has jurisdiction over petitioner's appeal is a question of law which the Court reviews de novo. King v. Merit Systems Prot. Bd., 105 F.3d 635, 638 (Fed. Cir. 1997). Petitioner has the burden of establishing the Board's jurisdiction. [Pet.'s Note: Petitioner met the burden by a preponderance of evidence, but the Board did not consider the evidence filed with the Board.]. Ellison v. Merit Systems Prot. Bd., 7 F.3d 1031, 1036 (Fed. Cir. 1993).

The Board's appellate jurisdiction under 5 U.S.C. § 7701(a) is strictly limited to that provided by statute or regulation. [Pet.'s Note: See Appendix F, Tabs 2-6, & 8; 2 U.S.C. § 1434.]. Forest v. Merit Systems Prot. Bd., 47 F.3d 409, 410 (Fed. Cir. 1995). The Board has authority to hear appeals from removals for misconduct or poor work performance under 5 U.S.C. §§ 7513(d) and 4303(e). However, such appeals are limited to individuals who are

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"employees" as defined in 5 U.S.C. § 7511(a)(1). Hartman v. Merit Systems Prot. Bd., 77 F.3d 1378, 1380 (Fed. Cir. 1996).  
See also U.S.C. § 4303(e), (f).

For purposes of the adverse action subchapter, section 7511(a) defined "employee" in relevant part as: 1) an individual in the competitive service [Pet.'s Note: See 5 C.F.R. § 1.2, Extent of Competitive Service, Appendix F, Tab 8.]; 2) a preference eligible individual in the excepted service with 1 year of current continuous service in an executive agency. It is evident that, as the Board found, the petitioner does not meet any of these definitions of an "employee" who is entitled to appeal to the Board.

In her petition for review, Ms. Johnson contended that she was a nonpreference eligible with sufficient service to be entitled to appeal to the Board. However, it is clear that her service was not in an executive agency, as required by the statute. An "executive agency" is defined in 5 U.S.C. § 105 to include an executive department, a government

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corporation, and an independent establishment. An "independent establishment" is defined in 5 U.S.C. § 104 to include only an establishment in the executive branch and the General Accounting Office. [Pet.'s Note: including judicial (2 U.S.C. § 1434) and legislative (CAA of 1995) branches of the government.]. These definitions clearly do not include the United States courts, which are in the judicial branch. See Hartman v. Merit Systems Prot. Bd., 77 F.3d at 1381.

Ms. Johnson was appointed to her position under 28 U.S.C. § 715(b). This provision authorizes the senior staff attorney, appointed under 28 U.S.C. § 715(a) by the chief judge of each court of appeals, to appoint, with the approval of the chief judge, "necessary staff attorneys and secretarial and clerical employees. . . ." <sup>1</sup> The same provision

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<sup>1</sup> The number of staff hired must be approved by the Administrative Office of the U.S. Courts (AO), a separate agency within the judicial branch [Pet.'s Note: Although Respondents, the Board, and the Agency were adamant with their position that the AO is a separate agency within the judicial branch, Petitioner categorically asserts and without a doubt, and due to internal knowledge due to her duties in the position as a personnelist



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authorizes the senior staff attorney to remove such employees with the approval of the chief judge. Consistent with this provision, the notifications of personnel action for petitioner's two staff positions at the court of appeals indicate that her appointments were in the judicial branch. RA 14-15.

The Board also correctly rejected petitioner's argument that she was entitled to appeal as an individual in the competitive service. The competitive service is defined in 5 U.S.C. § 2102(a) as including all civil service positions in the executive branch with specified exceptions and civil service positions [Pet.'s Note: not only executive but also judicial and legislative branches of the government] not in the executive branch "which are specifically included

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before her retaliatory firing, the AO is the only administrative agency in the judicial branch.] established by 28 U.S.C. § 601 to supervise administrative matters relating to the courts' clerical personnel. The AO was the respondent below, but the Petitioner was an employee of the court of appeals. See Hartman v. Merit Systems Protection Board, 77 F.3d at 1380. [Petitioner's case before the court is distinguishable from the Hartman case.].

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in the competitive service by statute.”<sup>2</sup>

The statutes that govern employment in the courts of appeals, 28 U.S.C. § 711-717, do not include any of the positions that they cover in the competitive. Petitioner has cited no statute that places her position in the competitive service. [Pet.'s Note: See Appendix F about parallel statutes, which Petitioner cited and attached copies of those rules, regulations, and statutes, but the Board never considered them. See also, 5 C.F.R. § 1.2, “the competitive service shall include (a) . . . . (b) all positions in the legislative and judicial branches of the federal government . . . which are specifically made subject to the civil service laws by statute.” (Appendix E).] Thus, it is also clear that she does not qualify as an employee entitled to appeal to the Board on this basis.

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<sup>2</sup> Contrary to Petitioner's assertion, Motion to Supplement Initial Brief at 4, the definition of the competitive service in 5 C.F.R. § 1.2 is the same. [Pet.'s Note: Don't know what he meant by this, but Petitioner's evidence on Appendix F, Tab 8, administrative law, rules, regulations, and statutes, that the laws she cited are very clear, about Petitioner's assertion that her employment was under the federal civil service employment regulation.]

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Before the Court, Ms. Johnson contends that, because she alleged that her removal was based on discrimination, her case was a "mixed case" under 5 U.S.C. § 7702. PB 4-5. Petitioner is mistaken in this contention. Although she claimed discrimination in violation of various statutes listed in section 7702(a)(1)(B), such allegations must be made with respect to a personnel action that is otherwise appealable to the Board. [Pet.'s Note: Petitioner alleged prohibited personnel practice, intentional discrimination and disparate treatment due to non promotion for several years, and retaliatory removal.]. See 5 U.S.C. § 7702(a)(1)(A). Since the Board lacks jurisdiction over personnel actions affecting employees of the judicial branch, petitioner's removal provides no basis for the Board's jurisdiction over the discrimination claims. See Hartman v. Merit Systems Prot. Bd., 77 F.3d at 1381, citing Brodts v. Merit Systems Prot. Bd., 11 F.3d 1060, 1061 (Fed. Cir. 1993). Finally, the definition of the term employee in

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the AO's Model Employment Dispute Resolution Plan on which the petitioner relies, Motion to Supplement Initial Brief at 3, is clearly irrelevant to the issue of petitioner's status under 5 U.S.C. § 7511(a).

[Pet.'s Note: And why not? 11<sup>th</sup> Circuit Model EDR Plan was modeled under the AO's EDR Plan, which "shall be known as the Federal Judiciary Model Employment Dispute Resolution Plan ("Model EDR Plan"). It was adopted by the Judicial Conference of the United States in order to provide rights and protections to employees of the United States courts which are comparable to those provided to legislative branch employees under the Congressional Accountability Act of 1995." (Appendix F-2, 6).].

4. Did the MSPB fail to consider important grounds for relief?

No.

5. Are there other reasons why the MSPB's decision was

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wrong?

No. Petitioner is mistaken in asserting, Motion for Reconsideration and Reply to Motion at 3, that the Board is required by Fed.Cir.R. 15(c)(2) to address her discrimination claims. This requirement does not apply because, in her Fed.Cir.R. 15(c) Statement Concerning Discrimination, Ms. Johnson stated that she was seeking only review of the Board's dismissal of her case for lack of jurisdiction. [Pet.'s Note: Incorrect. See the continuation page, Appendix 13-A.]. Petitioner's extensive discussion of the merits of her discrimination claims in her brief does not change the effect of her statement concerning the matter under review. [Pet.'s Note: See U.S. Court of Appeals for Federal Circuit Order entered November 8, 2004 (Appendix A-12), pages 1 & 2 second paragraphs (on both pages). 5 U.S.C. § 7703(a)(2).]. The Board did not address petitioner's discrimination allegations in its decision, and these claims

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are not before the Court.

6. What relief do you want the court to take in this case?

The Court should affirm the Board's decision dismissing Ms. Johnson's appeal for lack of jurisdiction.

7. Do you want to argue before the court in person?

No. Oral argument is not necessary in this case.

Respectfully submitted,

MARTHA B. SCHNEIDER  
General Counsel

STEPHANIE M. CONLEY  
Reviewing Attorney

/s/\_\_\_\_\_  
CALVIN M. MORROW  
Attorney  
Office of the General Counsel  
Merit Systems Protection Board  
1615 M Street, NW  
Washington, DC 20419-0002  
(202) 653-6772 Ext 1280

December 20, 2004

**APPENDIX — 6-A**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE FEDERAL CIRCUIT**

**JOHNSON v MSPB**

**04-3452**

**Entry of Appearance**

(INSTRUCTIONS: Counsel refer to Federal Circuit Rule 47.3. Pro se petitioners and appellants read paragraphs 1 and 18 of the Guide for Pro Se Petitioners and Appellants. This form was prepared using information currently known in the Clerk's Office. If this information is incorrect or incomplete, please provide the correct information. File this form with the clerk and serve it on the principal attorney for each party.)

Please enter my appearance:

\_\_\_ Pro Se ☒ As counsel for:  
    U.S. Merit Systems Protection Board

**Name of Party**

I am, or the party I represent is (select one):

\_\_\_ Pro Se ☒ Respondent  
                  \_\_\_ Amicus Curiae  
\_\_\_ Appellant \_\_\_ Appellee  
                  \_\_\_ Intervenor

As amicus curiae or intervenor, this party supports (select one):

\_\_\_ Petitioner or appellant \_\_\_ Respondent or appellee



APPENDIX — 6-A

My address and telephone are:

Name: Calvin Morrow  
Law Firm (counsel only):  
U.S. Merit Systems Protection Board Address: 1615  
M Street, NW  
City, State, Washington, DC 20419  
and Zip:  
Telephone: (202) 653-6772 x 1280  
Fax: (202) 653-6203  
E-mail address \_\_\_\_\_

Statement to be completed by counsel only (select one):

X I am the principal attorney for this party in this case and will accept all service for the party. I agree to inform all other counsel for the party in this case of the matters served upon me.

\_\_\_\_\_ I am not the principal attorney for this party in this case.

Date admitted to Federal Circuit bar (counsel only): //

This is my first appearance before the U. S. Court of Appeals for the Federal Circuit (counsel only): \_\_\_\_ yes \_\_\_\_ no

\_\_\_\_\_ A courtroom accessible to the handicapped is required if oral argument is scheduled.

Date: 12/20/2004

/s/ Calvin M. Morrow  
Signature of Pro Se or Counsel

cc: Johnson



## **APPENDIX — 7-A**

### **APPENDIX TO RESPONDENT'S BRIEF**

#### **INDEX TO THE APPENDIX**

| <b><u>Item</u></b>  | <b><u>Page</u></b> |
|---|--------------------|
| <b>MSPB Decision (July 12, 2004)</b>                        | <b>1</b>           |
| <b>MSPB Initial Decision<br/>(Oct. 9, 2003)</b>             | <b>7</b>           |
| <b>Certified List</b>                                       | <b>10</b>          |
| <b>Notification of Personnel Action<br/>(Jan. 25, 1989)</b> | <b>14</b>          |
| <b>Notification of Personnel Action<br/>(Oct. 2, 2001)</b>  | <b>15</b>          |
| <b>Termination Letter<br/>(June 20, 2003)</b>               | <b>16</b>          |
| <b>Petition for Review<br/>(Nov. 6, 2003) (excerpt)</b>     | <b>18</b>          |

**APPENDIX — 7-A**

**UNITED STATES OF AMERICA**

**MERIT SYSTEMS PROTECTION BOARD**

**EVELYN L. JOHNSON,**

**DOCKET NUMBER AT-0752003-0934-I-1**

**Appellant,**

**v.**

**ADMINISTRATIVE OFFICE**

**OF THE U.S. COURTS,**

**Agency.**

**DATE: JUL 12, 2004**

**Dawn M. Rivera, Esquire,**

**Atlanta, Georgia, for the appellant.**

**Susan T. Kattan, Esquire,**

**Washington, D.C., for the agency.**

**BEFORE**

**Neil A. G. McPhie, Acting Chairman**

**Susanne T. Marshall, Member**

**OPINION AND ORDER**

¶1 The appellant has petitioned for review of an initial decision that dismissed her appeal as withdrawn. For the

## **APPENDIX — 7-A**

reasons set forth below, we DENY the appellant's petition for review, VACATE the initial decision, and DISMISS the appeal for lack of jurisdiction

### **BACKGROUND**

¶2 The appellant appealed her removal from her position with the Staff Attorneys' Office of the United States Court of Appeals for the Eleventh Circuit. Initial Appeal File (IAF), Tab 1. Shortly thereafter, the appellant's designated representative filed a Notice of Withdrawal of Appeal on the appellant's behalf. IAF, Tab 4. The administrative judge then issued an initial decision in which he dismissed the appeal as withdrawn. IAF, Tab 5.

¶3 The appellant, who is now pro se, has filed a petition for review of the initial decision in which she contends that she does not wish to withdraw her appeal, the agency misled her as to her appeal rights, and the Board has jurisdiction over her appeal because she is an excepted service employee with more than two years of current continuous service. Petition for Review (PFR) File Tab 1 at 2-3. Subsequent to the filing of her petition for review, the appellant submitted

## APPENDIX — 7-A

a number of additional pleadings in which she argues, inter alia, that the Board has jurisdiction over her case because she is a federal employee and because her case involves a mixed-case appeal. PFR File, Tab 4 at 3; Tab 5 at 2; Tab 7 at 2-3; Tab 8 at 4; Tab 11 at 4. The agency has responded in opposition to the PFR, arguing that the Board lacks jurisdiction over the appeal because the appellant is an employee of the judicial branch and does not have Board appeal rights under 5. U.S.C. § 7511(a). PFR File, Tab 6 at 4.

## ANALYSIS

¶4 The Board normally will not consider evidence or argument filed after the close of the record on review. See, e.g., *Brown v. Department of Defense*, 94 M.S.P.R. 669, ¶ 4 (2003); *Gray v. U.S. Postal Service*, 93 M.S.P.R. 161, ¶ 9 (2002). Further, the Board normally does not consider evidence and argument which was not provided to the administrative judge. See, e.g., *Turner v. U.S. Postal Service*, 90 M.S.P.R. 385 ¶ 5 (2001); *Banks v. Department of the Air*

## APPENDIX — 7-A

Force, 4 M.S.P.R. 268, 271 (1980); *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980). Here, however, because the appellant withdrew her appeal before the agency was required to submit its file, the record below was wholly undeveloped on the matter of jurisdiction. Both parties have now fully addressed the issue of jurisdiction on review and, under the unique circumstances of this case, we find it appropriate to consider all of the pleadings filed, even though some of them were submitted after the close of record on review without a showing that they were based on new and material evidence not available before the record closed. *Cf. Turner*, 90 M.S.P.R. 385, ¶ 5 (the Board considered evidence and argument concerning jurisdiction submitted for the first time on review); *Black v. Department of Housing & Urban Development*, 78 M.S.P.R. 561, 565-66 (1998) (same).

¶5 The Board's jurisdiction is not plenary, but is limited to those matters over which it has been given jurisdiction by law, rule, or regulation. *See, Lovoy v. Department of Health & Human Services*, 91 M.S.P.R. 506 ¶ 6 (2002). While the

## APPENDIX — 7-A

Board is empowered by statute to hear appeals of removals from the Federal service, 5 U.S.C. § 7512(1), 7513(D), 7701(a), the right to appeal an action to the Board is limited to those persons who meet the definition of "employee" set forth in 5 U.S.C. § 7511(a)(1).

¶6 There are several ways to meet the statutory definition of "employee." One is to be an individual in the competitive service who has completed a probationary period or trial period under an initial appointment or who has completed one year of current continuous service under other than a temporary appointment limited to one year or less. 5 U.S.C. § 7511(a)(1)(A). A second way is to be a preference eligible individual in the excepted service who has completed one year of current continuous in the same or similar positions in an executive agency, the United States Postal Service, or the Postal Rate Commission. 5 U.S.C. § 7511(a)(1)(B). A third way is to be a nonpreference eligible individual in the excepted service who is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service or similar

## APPENDIX — 7-A

positions in executive agency under other than a temporary appointment limited to two years or less. 5 U.S.C. § 7511(a)(1)(c).

¶7 The “competitive service” consists of all civil service positions in the executive branch (with a few exceptions not relevant to this case), as well as certain positions not in the executive branch which are specifically included in the competitive service by statute. 5 U.S.C. § 2101(a). Thus, whether the individual is in the competitive service or the excepted service, an individual’s position must either be a position in executive agency or a non-executive agency position specifically included by the statute in the competitive service if she is to have appeal rights to the Board.

¶8 The term “executive agency” includes an executive department, a government corporation, and an independent establishment. 5 U.S.C. § 105. It manifestly does not include any court or instrumentality within the judicial branch. *Hartman v. Merit Systems Protection Board*, 77 F.3d 1378, 1379, 1381, (Fed. Cir. 1996).



## APPENDIX — 7-A

¶9 The appellant does not contend that she is an executive branch employee; she merely contends that she is a federal employee. Although the appellant was undoubtedly employed by an organ of the United States Government, she was a judicial branch employee, not an executive branch employee. The agency has submitted copies of judicial branch analogues to the executive branch Standard Form 50 which clearly demonstrate that the appellant is an employee of the judicial branch. PFR File, Tab 6 at 7-8. The appellant does not dispute the authenticity or import of these documents and, in fact, she submits the identical documents into the record herself. PFR File, Tab 7, Exhibit 3 at 7. We find, therefore, that the appellant is an employee of the judicial branch. Because the appellant is not an executive branch employee, the Board lacks jurisdiction over her appeal. *Cf. Hartman*, 77 F.3d at 1380-81 (the Board lacked jurisdiction over an individual right of action (IRA) appeal brought under 5 U.S.C. § 1221 by a judicial branch employee of an executive agency or the Government Printing Office.).

¶10 Finally, we note that, although the appellant argues



## APPENDIX — 7-A

that her position is in the competitive service, we have considered whether her position could be deemed to be in the competitive service and we find that it cannot. There is no statute which specifically includes the appellant's position in the competitive service. See 5 U.S.C. § 2102(a)(2). Positions in the United States Circuit Courts of Appeals are governed by 28 U.S.C. § 711 *et seq.* None of those statutory provisions state that the judicial branch positions to which they apply are included in the competitive service. See 28 U.S.C. §§ 711 (clerks, clerks' deputies, and clerks' assistants), 712 (law clerks and judges' secretaries), 713 (librarians and librarians' assistants), 714 (criers and messengers), 715 (staff attorneys, their secretarial and clerical employees, and technical assistants.)

### ORDER

¶11 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c).

## **APPENDIX — 7-A**

### **NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS**

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals  
for the Federal Circuit  
717 Madison Place, N.W.  
Washington, D.C. 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. See *Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

## APPENDIX — 7-A

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 77703). You may read this law as well as review the Board's regulations and other related material at our web site,

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FOR THE BOARD

/s/ Bentley M. Roberts, Jr.  
Bentley M. Roberts, Jr.  
Clerk for the Board

Washington, D.C.

**APPENDIX — 8-A**

**UNITED STATES OF AMERICA**

**MERIT SYSTEMS PROTECTION BOARD**

**ATLANTA REGIONAL**

**EVELYN L. JOHNSON,**

**DOCKET NUMBER AT-0752-03-0934-1-1**

**Appellant,**

**v.**

**ADMINISTRATIVE OFFICE**

**OF THE U. S. COURTS,**

**Agency.**

**Date: Oct 9, 2003**

**Dawn M. Rivera, Esquire**

**Atlanta, Georgia, for the appellant.**

**No appearance for the agency.**

**BEFORE**

**Anthony W. Cummings**

**Administrative Judge**

**INITIAL DECISION**

**On September 9, 2003, Evelyn Johnson filed an  
appeal with the Board's Atlanta Regional Office from the**

## **APPENDIX — 8-A**

agency's action removing her from her position as Human Resources Coordinator, effective June 27, 2003. Appeal File, Tab 1. On October 8, 2003, the appellant informed this office of her desire to withdraw the instant appeal via a signed written correspondence.

The appellant's withdrawal is an act of finality. See *Luellen v. U. S. Postal Service*, 88 M.S.P.R. 11, 16 (2001).

### **DECISION**

The appeal is DISMISSED.

FOR THE BOARD:

/s/ Anthony W. Cummings  
Anthony W. Cummings  
Administrative Judge

### **NOTICE TO APPELLANT**

This initial decision will become final on November 13, 2003, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review

## **APPENDIX — 8-A**

with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

### **BOARD REVIEW**

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board  
Merit Systems Protection Board  
1615 M Street, NW  
Washington, DC 20419

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be postmarked, faxed, or hand-redelivered no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 10 days after the date you actually receive the initial decision. If you fail to provide a statement with your petition that you have either mailed, faxed, or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

### **JUDICIAL REVIEW**

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals  
for the Federal Circuit  
717 Madison Place, NW  
Washington, DC 20439

## APPENDIX — 8-A

You may file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

### NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

.....

**U. S. MERIT SYSTEMS PROTECTION BOARD**  
**Office of the Clerk of the Board**  
**1615 M Street, NW**  
**Washington, DC 20419-0002**  
Phone: 202 653-7200, Fax: 202-653-7130 E-Mail

---

04-3452

### ATTESTATION

I HEREBY ATTEST that the attached index represents a list of the documents comprising the administrative record of the Merit Systems Protection Board in the appeal of Evelyn L. Johnson v. Administrative Office Of The U.S. Courts, MSPB Docket No. AT-0752-03-0934-1-1, and that the administrative record is under my official custody and control on this date.

on file in this Board.

September 28, 2004  
Date

/s/  
Bentley M. Roberts, Jr.  
Clerk of the Board

**APPENDIX — 8-A**

**INDEX**

**EVELYN L. JOHNSON**

**v.**

**ADMINISTRATIVE OFFICE OF THE U. S. COURTS**

**Docket No. AT-0752-03-0934-I-1**

**Volume I**

|     | DOCUMENT                      | DATE OF                |
|-----|-------------------------------|------------------------|
| TAB | DESCRIPTION                   | RECEIPT OR<br>ISSUANCE |
| 1   | Initial Appeal to MSPB        | Sept. 23, 2003         |
| 2   | Acknowledgment Order          | Sept. 25, 2003         |
| 3   | Appellant Designation of Rep. | Sept. 26, 2003         |
| 4   | Appellant: withdrawn request  | October 8, 2003        |
| 5   | Initial Decision              | October 9, 2003        |



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**INDEX**

**EVELYN L. JOHNSON**

**v.**

**ADMINISTRATIVE OFFICE OF THE U. S. COURTS**

**MPSB Docket No AT-0752-03-0934-I-1**

**IA-REFORM ACT MERIT - PETITION FOR REVIEW**

| <b>TAB</b> | <b>DESCRIPTION<br/>OF DOCUMENT</b>                            | <b>DATE OF<br/>RECEIPT OR<br/>ISSUANCE</b> |
|------------|---|--|
| 1          | Appellant - Petition for Review                               | Nov. 06, 2003                              |
| 2          | MSPB - Acknowledgment Letter                                  | Nov. 10, 2003                              |
| 3          | Appellant-Appl's Filing of<br>11/12/03                        | Nov. 12, 2003                              |
| 4          | Appellant - Appl's Filing dated<br>11/14/03                   | Nov. 14, 2003                              |
| 5          | Appellant - Appl's Additional<br>Submission to PFR            | Nov. 24, 2003                              |
| 6          | Agency - Agency Response to<br>Appl's PFR; Designation of Rep | Dec. 24, 2003                              |
| 7          | Appellant - Appl. Further response<br>to initial decision     | Dec. 29, 2003                              |
| 8          | Appellant - Appl's Additional<br>Material Evidence            | Dec. 29, 2003                              |
| 9          | Appellant - Appl's disclosure<br>of Coverage                  | Jan. 08, 2004                              |

## **APPENDIX — 8-A**

- 10    Appellant - Appl. Resp. To  
         Circuit Court of Appeals,  
         decision and Motion            Jan. 26, 2004
- 11    Appellant - Motion to Grant  
         Relief                            Feb. 18, 2004
- 12    Appellant - Additional Information  
         w/ Attachments (separate binder) April 13, 2004
- 13    Appellant - Supplemental  
         Materials (separate binder)        June 29, 2004
- 14    MSPB - Opinion and Order            July 12, 2004

## APPENDIX — 8-A

### ADMINISTRATIVE OFFICE OF THE U.S. COURTS

#### NOTIFICATION OF PERSONNEL ACTION

(AO 250 -Form)

Date Typed — 01/25/89

|   |  |                               |
|---|--|-------------------------------|
| 1. Name<br>Johnson, Evelyn L.                         | 2. Sex<br>F  | 3. DOB<br>10/23/51            |
| 4. SSN - 231-11-0983                                  | 5. Employment<br>Not to Exceed<br>N/A                              | 6. SCD<br>(Leave)<br>07/26/82 |
| 7. L.E.I - 01/17/89                                   | 8. WGI Due Date<br>01/29/90  |                               |
| 9. FEGLI - K<br>(See Reverse Side<br>for Explanation) | 10. RETIREMENT - P<br>(See Reverse Side<br>for Explanation)        |                               |
| 11. Citizenship<br>1 (U.S.)                           | 12. Type of Appointment<br>FTP                                     |                               |
| 13. Annuitant Indicator<br>9 (N/A)                    | 14. SCD (HAZ)<br>N/A   |                               |
| 15. H.B. Code<br>452                                  | 15(a) Effective Date<br>01/17/89                                   |                               |
| 16. NOA<br>170A                                       | (a) Nature of Action<br>Excepted Appointment                       |                               |
| 17. Effective Date<br>01/17/89                        | 18. Authority<br>AO 79 dated 1/17/89<br>& AO Letter Dated 11/15/88 |                               |
| 19. From Position<br>N/A                              | 20. Pay Plan<br>N/A  | 21. Grade/<br>Step<br>N/A     |

# **APPENDIX — 8-A**

|            |            |                  |
|------------|------------|------------------|
| 22. Salary | 23(a) COLA | 23(b) Post Diff. |
| N/A        | N/A        | N/A              |

|               |                           |
|---------------|---------------------------|
| 23(c) Annuity | 24. Name and Location     |
| N/A           | of Employing Office — N/A |

|                                     |              |
|-------------------------------------|--------------|
| 25. To: Position Title and Number   | 26. Pay Plan |
| Court Secretary (Staff Atty) 031011 | JS 14        |

|                |                |            |
|----------------|----------------|------------|
| 27. Grade/Step | 28. Salary     | 29(a) COLA |
| JSP 6/01       | \$19,297.00 PA | N/A        |

|                  |               |
|------------------|---------------|
| 29 (b) Post Diff | 29(c) Annuity |
| N/A              | N/A           |

|   |   |
|---|---|
| 30. Name and Location of<br>Employing Office —<br>A11XXXAAATGAN<br>Eleventh Circuit<br>50 Spring Street, S.W<br>To Position<br>C8900255 | 31. Remarks<br>From Position:<br>Notice Sent to:<br>Ms. Karen C. Wilbanks<br>Employee transferred<br>from Atlanta, GA 30303<br>the VA Regional Office<br>without a break in<br>service. Benefits remain<br>in effect. |
|---|---|

|          |                        |
|----------|------------------------|
| 32. Vice | 33. JUDGES (a) Date of |
| New      | ONLY Nomination        |

|              |             |                 |
|--------------|-------------|-----------------|
| (b) Date of  | (c) Date of | (d) Eligible to |
| Confirmation | Commission  | Retire          |

34. Office Maintaining Personnel Folder  
Administrative Office of the U.S. Courts

|          |                                |
|----------|--------------------------------|
| 35. Code | Employing Department or Agency |
| JL01     | Judicial Branch                |

36(a) Signature (or other authentication) (b) Date  
Charlotte G. Peddicord

(c) Title — Human Resources Division

**APPENDIX — 8-A**

**ADMINISTRATIVE OFFICE OF THE U.S. COURTS**

**NOTIFICATION OF PERSONNEL ACTION**

**(AO 250 - Form)**

**Date Typed — 10/02/01**

|                    |               |               |               |
|--------------------|---------------|---------------|---------------|
| <b>1. Name</b>     | <b>2. Sex</b> | <b>3. DOB</b> | <b>4. SSN</b> |
| Johnson, Evelyn L. | F             | 10/23/51      | 231-11-0983   |

|                      |               |                 |               |
|----------------------|---------------|-----------------|---------------|
| <b>5. Employment</b> | <b>6. SCD</b> | <b>7. L.E.I</b> | <b>8. WGI</b> |
| Not to Exceed        | (Leave)       | 09/10/01        | Due Date      |
| N/A                  | 07/08/82      |                 | 09/09/02      |

|                 |                       |
|-----------------|-----------------------|
| <b>9. FEGLI</b> | <b>10. RETIREMENT</b> |
| CO (See Reverse | K (See Reverse        |
| Side for Expla- | Side for Explanation) |
| nation)         |                       |

|                        |                    |                      |
|------------------------|--------------------|----------------------|
| <b>11. Citizenship</b> | <b>12. Type of</b> | <b>13. Annuitant</b> |
| 1 (U.S.)               | Appointment        | Indicator            |
|                        | FTP                | 9 (N/A)              |

|                      |                      |                        |
|----------------------|----------------------|------------------------|
| <b>14. SCD (HAZ)</b> | <b>15. H.B. Code</b> | <b>15(a) Effective</b> |
| N/A                  | 105                  | Date - 01/03/00        |

|                |                             |                           |
|----------------|-----------------------------|---------------------------|
| <b>16. NOA</b> | <b>(a) Nature of Action</b> | <b>17. Effective Date</b> |
| 702            | Promotion                   | 09/10/01                  |

**18. Authority - PER AO-193 DATED 09/07/01**

|                          |                     |                       |
|--------------------------|---------------------|-----------------------|
| <b>19. From Position</b> | <b>20. Pay Plan</b> | <b>21. Grade/Step</b> |
| Sec. To Sr. SA           | CPS                 | CL 25/45              |

|                   |                   |                         |
|-------------------|-------------------|-------------------------|
| <b>22. Salary</b> | <b>23(a) COLA</b> | <b>23(b) Post Diff.</b> |
| \$42,154.00 PA    | N/A               | N/A                     |

|                      |                              |
|----------------------|------------------------------|
| <b>23(c) Annuity</b> | <b>24. Name and Location</b> |
| N/A                  | of Employing Office          |

# APPENDIX — 8-A

25. To: Position Title and Number  
Human Resources Coordinator

26. Pay Plan  
CPS

27. Grade/Step  
26/40

28. Salary  
\$44,780.00 PA

29(a) COLA  
N/A

(b) Post  
Diff.  
N/A

29(c) Annuity  
N/A

30. Name and Location of  
Employing Office —  
A11XXXAAATGAN  
Eleventh Circuit  
50 Spring Street, S.W  
Atlanta, GA 30303

32. Vice  
New  
Position  
To  
Position  
C8900255

31. Remarks

From Position: P8618299

Notice sent to: Ms. Naomi Godfrey

33. JUDGES  
ONLY

(a) Date of  
Nomination

(b) Date of  
Confirmation

(c) Date of  
Commission

(d) Eligible to  
Retire

34. Office Maintaining Personnel Folder  
Administrative Office of the U.S. Courts

35. Code  
JL01

Employing Department or Agency  
Judicial Branch

36(a) Signature (or other authentication) (b) Date  
Charlotte G. Peddicord

(c) Title — Human Resources Division

[Pet.'s Note: The referenced two official Notification of Personnel Action (AO-250 Form) hardly show the complete and true picture of Petitioner's allegations of intentional discrimination and disparate treatment due to non promotion. The employing office was trying to justify its adverse personnel action based on the promotion Petitioner received in September 2001.]

**APPENDIX — 8-A**

**UNITED STATES COURT OF APPEALS  
ELEVENTH CIRCUIT  
STAFF ATTORNEY'S OFFICE**

June 20, 2003

Mrs. Evelyn Johnson  
6241 South Skyline Dr.  
Douglasville, GA 30135

Dear Ms. Johnson:

I write to inform you that you are terminated from the Staff Attorneys' Office. This action has become necessary because of your insubordinate behavior, unsatisfactory work, and inappropriate conduct in the discharge of your responsibilities. I am mindful of your years of service to the court and this office and I take this action only after extremely careful consideration and due reflection. This decision is based on the recommendation of your immediate supervisor, the reports of others, and my personal observations of your conduct and performance.

Although you have been given every consideration, your work performance over the last year has been unacceptable. Since January 21, 2002, when Sara Gilibert began work in the office and became your immediate supervisor, your performance has been unsatisfactory and continues to decline. She has repeatedly advised you to correct your performance deficiencies and tried to enlist your support in performing the personnel duties of the office. Despite Ms. Gilibert's best efforts, your continued failure to follow her directives, your insubordination to her, your failure satisfactorily to perform your assigned duties, and your refusal to communicate with her and other administrative staff have resulted in inefficient operations in this office. You have been repeatedly counseled, admonished, and warned that such conduct will not be tolerated and will result in disciplinary action if not corrected. Yet, you continue to fail to carry out your assignments and responsibilities or to work with Sara Gilibert in a satisfactorily manner.



## APPENDIX — 8-A

Because of these continuous unacceptable actions and behavior, you will no longer be accorded the privilege to work for the court and this office. The situation has become one that this office institutionally will not tolerate. Accordingly, and as a result of your unacceptable performance, you are hereby terminated from your position with the Staff Attorney's Office. This termination will be effective June 27, 2003, at the close of business. Under the authority of the Court's Adverse Action Plan and with the Court's approval, I am placing you immediately in a nonduty status with pay through June 27, 2003. As an alternative, I will accept your resignation effective on or before Friday, June 27, 2003, close of business.

Consistent with APPENDIX II of the Personnel Manual, you have the right to make a written request of the chief judge or his designee within 10 calendar days of the date of your receipt of this letter for a hearing. You also have the right to be represented at the hearing, to confront adverse witnesses, and to present evidence and arguments. If this action is vacated as a result of the hearing before the chief judge or his designee, you will be returned to your status prior to the action as if no action has been taken and all documents will be removed from the record.

I regret having to take this action and wish you every success in your future endeavors.

Sincerely,

/s/ Naomi G. Godfrey

Naomi G. Godfrey

Senior Staff Attorney



**APPENDIX — 9-A**

6241 S. Skyline Drive  
Douglasville, Georgia 30135  
(770) 489-0343 (H) — (404) 402-3578 (Cell)

November 5, 2003

**VIA FACSIMILE AND U.S. MAIL**

The Honorable Anthony W. Cummings  
Administrative Judge  
U.S. Merit Systems Protection Board  
Atlanta Regional Office  
401 West Peachtree Street, N.W.  
10<sup>th</sup> Floor  
Atlanta, Georgia 30308-3519

[RECEIVED MSPB  
2003 NOV 10 PM 3:49  
CLERK OF THE BD]

RE: Case Docket Number AT-0752-03-0934-I-1, Evelyn L.  
Johnson v. Admin. Office of the U.S. Courts

Dear Judge Cummings:

This request serves as a Notice to the Board of my intent to Reopen and Reconsider the Board's initial decision of dismissing the instant appeal filed with the Board. The Board issued the Order dated October 9, 2003, and will become final on November 13, 2003. My request to reopen and reconsider the case describes further complainant rights and substantive protections and to correct any procedural error.

1. The agency improperly informed the employee of employment rights after agency dismissal of the complaint; the employee's dissatisfaction with the processing of the underlying complaint, substantial evidence standard review,

## APPENDIX — 9-A

and with the agency's final decision.

2. The agency may not dismiss a complaint without issuing a ruling on the merits of the complaint. Previous decision involved harmful error in interpretation of fact and law, federal regulations, and material fact or misapplication of established policy renders exceptional nature that the decision will have substantial impact and effect on the employee;

3. Complaint involves both issues related to OPM regulations and the agency's own actions in applying the regulations. 5 U.S.C. § 8402;

4. Uncertainty of procedures appropriate for U.S. courts' employees because it is not clear which statutes apply, agency's unresponsiveness and failure to comply with requests, and new material evidence. (Please see attached).

### MSPB Jurisdiction — Mixed case — Right to Appeal to MSPB. 5 U.S.C. § 1204

The Civil Service Reform Act (CSRA) of 1978 created the OPM to take over the administrative personnel functions of Civil Service Commission (CSC). The MSPB was established to take over the many adjudicative functions of the CSC and to adjudicate appeals from aggrieved federal employees. When a federal employee alleges discrimination stemming from the so called "prohibited personnel practices, it was intended that the MSPB handles both the personnel aspects of an appealable action as well as issues of discrimination raised by an employee." Legislative History of the Civil Service Reform Act of 1978, 96<sup>th</sup> Cong. 1<sup>st</sup> Sess.

1. MSPB has jurisdiction for unacceptable performance removal of non preference eligible excepted service employees with two or more years of current continuous service. 5 U.S.C. § 2103(b); 5 U.S.C. § 1221(a);

## APPENDIX — 9-A

2. Complaints of discrimination involving personnel actions, and the terms conditions, and privileges of employment, hostile work environment harassment based on discrimination, and retaliation for protected activities; 5 CFR parts 831, 841, 844, and 846; 5 U.S.C. §§ 8347(d)(1)-(2) and 8461(e)(1); and 5 U.S.C. § 8331;

3. The complaint involves personnel actions within the jurisdiction of the MSPB, which raised an allegation of discrimination. The underlying complaint of intentional employment discrimination was based on race, color, sex, national origin, and age, stemming from allegations that involved matters within the jurisdiction of both the MSPB and EEOC. The EEOC jurisdiction extends to all personnel actions as well as the terms, conditions, and privileges of employment based on race, sex, color, age, and national origin, and jurisdiction over reprisal because of participation in the EEO process. As cited herein, discrimination on the bases of race, color, sex, age, national origin in the federal government is prohibited by the statute. *The Civil Rights Act of 1964, Amended in 1972 by Pub.L.No. 92-26; 42 U.S.C. §§ 2000e-16 et seq.; the Civil Rights Act of 1991, Pub.L.No. 102-166 (November 21, 1991); 29 CFR §§ 1614.302(a)(1) & (a)(2); 29 U.S.C. § 2039(d); 2 U.S.C. § 1434.*

Thank you for your kind assistance and consideration concerning this matter. Please direct correspondence to the employee's retained counsel, Dawn M. Rivera, 44 Broad Street, N.W., Suite 222, The Grant Building, Atlanta, Georgia 30303. Telephone (404) 542-9111. Fax (404) 524-6611

Respectfully submitted,

/s/ Evelyn L. Johnson  
Evelyn L. Johnson

**APPENDIX — 10 -A**

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT**

**EVELYN L. JOHNSON**

**Petitioner,**

**v.**

**ADMINISTRATIVE OFFICE OF THE  
UNITED STATES COURTS,**

**Respondent.**

**04-3452**

**ORDER**

After review and consideration of the Administrative  
Office of the United States Court's motion to recaption and  
designate the Merit Systems Protection Board as respondent,

**IT IS ORDERED THAT:**

The motion is granted.

**FOR THE COURT**

**DATED:** \_\_\_\_\_

**Copies to:**

Evelyn L. Johnson  
6241 S. Skyline Drive  
Douglasville, GA 30135  
Phyllis Jo Baunach  
Commercial Litigation Branch  
Civil Division

**APPENDIX — 10 -A**

U.S. Department of Justice  
Attn: Classification Unit  
1100 L St. N.W.  
Washington, D.C. 20530

Sara B. Reardon, Esq.  
Office of General Counsel  
Merit Systems Protection Board  
1615 M Street NW, Rm. 609  
Washington, D.C. 20419

Susan Kattan, Esq.  
Assistant General Counsel  
Administrative Office of the U. S. Courts  
One Columbus Circle, N.E.  
Washington, D.C. 20544

NOV 18 2004

JAN HORBALY/jb

RECEIVED  
2004 NOV - 9 PM 4:37  
US COURT OF APPEALS  
FEDERAL CIRCUIT

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

|                           |   |         |
|---------------------------|---|---------|
| Evelyn L. Johnson,        | ) |         |
|                           | ) |         |
| Petitioner,               | ) |         |
|                           | ) |         |
| v.                        | ) | 04-3452 |
|                           | ) |         |
| ADMINISTRATIVE OFFICE OF  | ) |         |
| THE UNITED STATES COURTS, | ) |         |
|                           | ) |         |
| Respondent.               | ) |         |
| _____                     | ) |         |

**RESPONDENT'S MOTION TO RECAPTION**

Pursuant to Federal Circuit Rule 27, respondent, the Administrative Office of the United States Courts, respectfully requests that the Court recaption this case to designate the Merit Systems Protection Board ("MSPB" or "board") as the respondent. Ms. Johnson states that she opposes this request.

The MSPB states that the case should be recaptioned. Petitioner, Evelyn L. Johnson, timely appealed to the MSPB an adverse action that removed her from employment with the Staff Attorney's Office of the United States Court of Appeals for the Eleventh Circuit. App. 1, ¶ 2.<sup>1</sup> Subsequently, Ms. Johnson's designated representative filed a notice of Withdrawal of Appeal upon behalf of Ms. Johnson, and, without addressing the merits of the case, the administrative judge issued an initial decision dismissing the appeal as withdrawn. App 1, ¶ 2.

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<sup>1</sup> "App. \_\_\_, ¶ \_\_\_" refers to the page of the appendix and the paragraph number of the opinion attached to this motion.



## APPENDIX — 11-A

On July 12, 2004, the full board denied Ms. Johnson's petition for review of the initial decision, vacated the initial decision and dismissed the appeal for lack of jurisdiction. App. 1, ¶ 1. Without addressing the merits of Ms. Johnson's appeal, the board reviewed all of the evidence regarding the jurisdictional issue. App 1-2, ¶ 4, ¶ 9. Specifically, the board noted that the right to appeal an action to the board is limited to persons who meet the definition of "employee," as set forth in 5 U.S.C. § 7511 (a) (1). App 2, ¶ 5.

The board carefully reviewed the criteria for "employee," as set forth in 5 U.S.C. § 7511 (a) (1), and whether Ms. Johnson met any of the criteria. App. 2, ¶ 6. An individual may be considered as an "employee," if she is in the competitive service and has completed a probationary period or trial period under an initial appointment or has completed one year of current continuous service under other than a temporary appointment limited to one year or less. 5 U.S.C. § 7511 (a) (1) (A). App. 2, ¶ 6. Additionally, an "employee" is a person who is a preference eligible individual in the excepted service and has completed one year of current continuous service in the same or similar positions in an executive agency, the United States Postal Service, or the Postal Rate Commission. 5 U.S.C. § 7511 (a) (1) (B). App. 2, ¶ 6. Finally, an "employee" is a nonpreference eligible individual in the excepted service who is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service, or who has completed two years of current continuous service in the same or similar positions in an executive agency under other than a temporary appointment limited to two years or less. 5 U.S.C. § 7511 (a) (1) (C). App 2 ¶ 6.

Additionally, the board noted that pursuant to 5 U.S.C. § 2101 (a), whether an individual is in the competitive service or the excepted service, the individual's position must either be a position in an executive agency or a non-executive agency position specifically included by statute in the competitive service if she is to have appeal rights to the

## APPENDIX — 11-A

board. App. 2, ¶ 7. The board also pointed out that term "executive agency: includes an Executive Department, a Government corporation, and an independent establishment, 5 U.S.C. § 105, and does not include any court or instrumentality within the Judicial Branch. App. 2 ¶ 8. Based upon personnel files, the board found that Ms. Johnson was an employee of the Judicial Branch. App. 3 ¶ 9. Because Ms. Johnson was not an Executive Branch employee, the board concluded that it lacked jurisdiction to entertain her appeal. App. 3, ¶ 9.

Pursuant to 5 U.S.C. § 7703 (a) (2), the board is the proper respondent to a petition for review in this Court "unless the [petitioner] seeks review of a final order or decision on the merits of the underlying personnel action or on a request for attorney fees." Because Ms. Johnson's petition challenges a decision concerning only the board's jurisdiction to hear the appeal, and not the merits, the board, not the agency, is the proper respondent. **[Pet.'s Note: Petitioner challenges the decision on the merits at the outset of filing this claim; therefore, the Respondent should be the Agency.]** The respondent and the board agree that the MSPB's dismissal of Ms. Johnson's appeal for lack of jurisdiction is not "*a final order or decision on the merits of the underlying personnel action,*" see 5 U.S.C. § 7703 (a) (2), and that the MSPB is the proper respondent in this case. Spruill v. Merit Systems Protection Board, 978 F.2d 679 689 (Fed. Cir. 1992).

Accordingly, we respectfully request the Court grant this motion and substitute the Merit Systems Protection Board as the respondent. A proposed order is attached.

Respectfully,

PETER D. KEISLER  
Assistant Attorney General



**APPENDIX — 11-A**

**DAVID M. COHEN**  
Director

/s/ PHYLLIS JO BAUNACH  
Trial Attorney  
Commercial Litigation Branch  
Civil Division  
Department of Justice  
Washington, D. C. 20530  
(202) 307-5832  
(202) 307-0972 [Fax]

**November 9, 2004**

**Attorneys for Respondent**

**APPENDIX — 12-A**

NOTE: Pursuant to Fed. Cir. 47.6, this order is not citable as precedent. It is a public order.

**United States Court of Appeals**

**for the Federal Circuit**

04-3452

**EVELYN L. JOHNSON**

**Petitioner,**

**v.**

**MERIT SYSTEMS PROTECTION BOARD,**

**Respondent.**

**ON MOTION**

Before GAJARSA, Circuit Judge.

**ORDER**

Evelyn L. Johnson submits 12 copies of her brief, one copy of a multi-volume appendix, and a "motion for relief," which the court treats as a motion for leave to file a supplement to her brief, with supplement attached. The court considers whether the caption should be reformed to designate the Merit Systems Protection Board as respondent in place of the Administrative Offices of the U. S. Courts

## APPENDIX — 12-A

(AO) and whether the requirements of Fed. Cir.R.30(a)(5) should be waived to allow Johnson to file fewer than 12 copies of her appendix with the court.

Pursuant to 5 U.S.C. § 7703(a)(2), the Board is designated as the respondent when the Board's decision concerns solely the procedure or jurisdiction of the Board. See Spruill v. Merit Sys. Protection Bd., 978 F.2d 679, 686 (Fed. Cir. 1992). The employing agency is designated as the respondent when the Board reaches the merits of the underlying case. Id.

Johnson appealed her termination from the position of human resources coordinator for the Office of the Senior Staff Attorney of the United States Court of Appeals for the Eleventh Circuit. The Board issued a final decision dismissing Johnson's appeal for lack of jurisdiction, concluding that Johnson was an employee of the judicial branch lacking Board appeal rights under 5 U.S.C. § 7511(a).

Because the Board's ruling was limited to a jurisdictional determination and did not address the underlying merits pertaining to Johnson's

APPENDIX — 12-A

termination, the Board is the proper respondent in this petition for review. See Spruill, 978 F.2d at 686.

Accordingly,

IT IS ORDERED THAT:

(1) The motion for leave to supplement the brief is granted.

(2) The revised official caption is reflected above.

(3) The AO is directed to promptly transmit to the Board copies of all documents that Johnson served on it and all documents that the AO filed with the court.

(4) Upon receipt by the clerk's office of three more complete copies of Johnson's appendix, the court will file Johnson's brief, supplement to the brief, and appendix.

(5) The Board's brief, either formal or informal, is due within 40 days of the date of filing of this order.

Nov - 8 2004

Date

/s/ Arthur J. Gajarsa

Arthur J. Gajarsa

Circuit Judge

cc: Evelyn L. Johnson  
Phyllis Jo Baunach, Esq  
Lynn Jennings, Esq.

Filed  
U.S. Court of Appeals  
for the Federal Circuit

Nov - 8 2004

04-3452

/s/ Jan Horbaly, Clerk

**APPENDIX — 13-A**

**UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT**

**NOTICE OF DOCKETING**

**04-3452 - JOHNSON V AO**

**09/14/04**

**(Date of Docketing)**

**Petition for review of:**

**MERIT SYSTEMS PROTECTION BOARD**

**AT0752030934-I-1**

**Name of petitioner: EVELYN L. JOHNSON**

**Critical dates for counsel, pro se parties, agencies, the  
board, and arbitrators include:**

**Date of docketing, as above (Rules 12 & 15)**

**Certified list due (Rule 17)**

**Entry of appearance due (Rule 47.3)**

**Certificate of interest due (Rule 47.4)**

**Statement concerning discrimination due (Fed. Cir.  
R. 15(c))**

**Briefs due (Rule 31). Pro se parties must not  
file the informal brief until after the certified  
list has been filed and served. "You will not  
receive a separate briefing schedule from the  
Clerk's Office."**

**Calendar for oral argument or submission on  
briefs (Rule 34 & Practice Note) - Please notify  
the Clerk's Office of any possible conflicts as  
soon as possible.**

**Filing fee due (Rule 52)**

**Pro se parties should refer to the GUIDE FOR PRO SE  
PETITIONERS AND APPELLANTS.**

**Attachments (with recipients noted) to this notice include;**

**Official caption (All)**

## APPENDIX — 13-A

Rules of Practice (pro se parties - attorneys must return the form below)

Entry of appearance form (All counsel and pro se parties)

Statement concerning discrimination (MSPB petitioners)

Informal brief form (Pro se parties)

Copy of Rule 15 petition for review (board and counsel for respondents)

Motion and Affidavit for Leave to Proceed in Forma Pauperis form (Parties owing the docketing fee)

JAN HORBALY, Clerk

cc: David M. Cohen, Department of Justice 1100 L Street, N. W. Room 12124 Washington, DC 20419  
Clerk, Merit Systems Protection Board, Washington, DC 20419

Evelyn L. Johnson

The Federal Circuit's Rules of Practice are available by calling (202) 633-6550, and the Rules are likewise available for downloading at \_\_\_\_\_

**APPENDIX — 13-A**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE FEDERAL CIRCUIT**

**Official Caption<sup>1</sup>**

04-3452

EVELYN L. JOHNSON,

Petitioner,

v.

ADMINISTRATIVE OFFICE  
OF THE U. S. COURTS,

Respondent.

Petition for review of the Merit Systems Protection Board in  
AT0752030934-1-1.

---

<sup>1</sup> Required for use on petitions, formal briefs and appendices, court opinions, and dispositive court orders. FRAP 12(a); 32(a).

**APPENDIX — 13-A**

**Authorized Abbreviate Caption<sup>2</sup>**

**UNITED STATES COURT OF APPEALS**

**FOR THE FEDERAL CIRCUIT**

**JOHNSON V AO**

**04-3452**

**Entry of Appearance**

(INSTRUCTIONS: Counsel refer to Federal Circuit Rule 47.3. Pro se petitioners and appellants read paragraphs 1 and 18 of the Guide for Pro Se Petitioners and Appellants. This form was prepared using information currently known in the Clerk's Office. If this information is incorrect or incomplete, please provide the correct information. File this form with the clerk and serve it on the principal attorney for each party.)

Please enter my appearance:

☒ Pro Se \_\_\_ As counsel for: EVELYN L. JOHNSON

I am, or the party I represent is: Petitioner: Petitioner

As amicus curiae or intervenor, this party supports (select

---

<sup>2</sup> Authorized for use only on items not requiring the Official Caption as listed in note 1.



APPENDIX — 13-A

one):

☐ Petitioner or appellant ☐ Respondent or appellee

Evelyn L. Johnson  
6241 S. Skyline Drive  
Douglasville, GA 30135  
770-489-0343

Appearing pro se

Fax #: 770-489-0343

E-mail Address: \_\_\_\_\_

Statement to be completed by counsel only (select one):

☐ I am the principal attorney for this party in this case and will accept all service for the party. I agree to inform all other counsel for the party in this case of the matters served upon me.

☐ I am not the principal attorney for this party in this case.

Date admitted to Federal Circuit bar (counsel only): //

This is my first appearance before the U. S. Court of Appeals for the Federal Circuit (counsel only): ☐ yes ☐ no

Date: 9/09/2004 /s/ Evelyn L. Johnson

Date notice issued: 9/14/04 Signature of Pro Se  
or counsel

APPENDIX — 13-A

04-3452

UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

Petition for Review or Notice of Appeal of an Order  
or Decision of the MSPB Board  
in Docket No. AT-0752-03-0934-I-1

Evelyn L. Johnson,

Petitioner,

v.

Staff Attorneys' Office (SAO) and Supervising Employees,  
et al., Employing Office,  
Acting on Behalf of the Administrative Office (AO) of the  
U. S. Courts,

Agency,  
Respondents.

Evelyn L. Johnson, hereby petitions/appeals the court  
for review of the MSPB Board's decision of the SAO, acting  
on behalf of the Agency, the AO, entered on July 12, 2004.

9 September 2004

Date

/s/ Evelyn L. Johnson

Evelyn L. Johnson

Pro Se Petitioner

RECEIVED

SEP 13, 2004

United States

Court of Appeals

For the Federal Circuit

6241 S. Skyline Drive

Douglasville, GA 30135

(770) 489-0343

UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

Evelyn L. Johnson v. Administrative Office of the U. S.  
Courts

No. 04-3452

Petitioner's Fed.Cir.R.15 (c) Statement Concerning  
Discrimination

**Continuation:**

Because of the unique nature of this case, Petitioner asserts this case was handled and processed in the district court, Northern District of Georgia, since the proceedings were administered by magistrate court judges, and final decision(s) of the hearing officers were affirmed by the chief appellate judge of this court. This case involves three major issues of discrimination and disparate treatment filed under Title VII, Civil Rights Act of 1964: 1) filing of the EDR discrimination complaint in 2002; 2) retaliatory termination of a tenured civil service employee in June 2003; 3) and the retaliatory termination was in retaliation and a result of filing the 2002 EDR complaint.

The case before this Court was intentional discrimination and disparate treatment filed with the employing office, U. S. Court of Appeals for the Eleventh Circuit, Staff Attorneys' Office (SAO), at the initial filing of the complaint in March 2002. While the other party to this case was the Administrative Office of the U.S. Courts (AO), employing office conducted the administrative proceedings from start to finish. All documents and material evidence pertaining to the entire case were also handled by the employing office, and Petitioner is uncertain if the employing

## APPENDIX — 13-A

office provided documents and material evidence to the agency, the AO.

At the outset of the filing of the initial complaint, allegations of discrimination, factual disputes, substantial material evidence were presented at the hearing(s), but those issues, allegations, and numerous factual disputes were addressed inappropriately. Petitioner also filed a discrimination case in the Equal Employment Opportunity Commission, but the file was returned to the Petitioner for "lack of jurisdiction." Although Petitioner incurred substantial tangible and intangible damages, this case has not been reviewed on its entirety, on its merits, and was never given an opportunity for an appropriate and impartial judicial review.

September 9, 2004

Date

/s/ Evelyn L. Johnson

Evelyn L. Johnson

Pro Se Petitioner

6241 S. Skyline Drive

Douglasville, GA 30135

**APPENDIX — 14-A**

**UNITED STATES COURT OF APPEALS  
Eleventh Circuit**

---

Room 416, 56 Forsyth Street  
Atlanta, Georgia 30303

**J.L. EDMONDSON**  
Chief Judge

16 January 2004

Dawn M. Rivera, Esq.  
Melville & Johnson, P.C.  
44 Broad Street, N.W.  
Suite 222, The Grant Building  
Atlanta, Georgia 30303

Re: October 27, 2003 EDR Complaint of Evelyn L.  
Johnson

Dear Ms. Rivera:

Enclosed please find my final decision in the above-  
referenced matter.

Sincerely,

/s/ J.L. Edmondson  
J.L. Edmondson  
Chief of the Eleventh

cc: Honorable Gerrilyn G. Brill  
Mr. Jeffrey O. Bramlett, Esq.  
Mr. Ronan P. Doherty, Esq.  
Ms. Evelyn L. Johnson

**APPENDIX — 14-A**

**UNITED STATES COURT OF APPEALS**

**FOR THE ELEVENTH CIRCUIT**

**EMPLOYMENT DISPUTER RESOLUTION**

**PROCEEDING**

**IN RE: Complaint of Evelyn Johnson**

**ORDER**

On 27 October 2003, Evelyn Johnson ("Petitioner") filed an Employment Dispute Resolution ("EDR") complaint contending that the Staff Attorneys' Office for the Eleventh Circuit Court of Appeals ("SAO") wrongfully terminated her employment on the basis of her national origin, and "perceived disability," and in retaliation for having filed a prior EDR complaint and using FMLA leave.

On 1 December 2003, I referred the matter to Magistrate Judge Gerrilyn Brill to determine, among other things, whether live issues remained to prevent Petitioner's employment from being terminated.

On 8 December 2003, Judge Brill conducted a hearing at which the parties were given the opportunity to present evidence on the issue of whether Petitioner's claim was

## APPENDIX — 14-A

procedurally barred. On 17 December 2003, Judge Brill issued her decision concluding and finding that Petitioner's complaint is procedurally barred and should be dismissed.

Upon independent review of Judge Brill's 17 December 2003 recommendation, and of the transcript of the underlying hearing, I accept, approve, and adopt Judge Brill's conclusion and finding; and I have decided that Petitioner's Employment Dispute Resolution complaint is procedurally barred. Accordingly, Petitioner's complaint is DISMISSED.

DONE AND ORDERED this 16<sup>th</sup> day of January 2004.

/s/ J.L. EDMONDSON

CHIEF JUDGE

**APPENDIX — 14-A**

**UNITED STATES COURT OF APPEALS  
ELEVENTH CIRCUIT**

---

Room 416, 56 Forsyth Street  
Atlanta, Georgia 30303

**J.L. EDMONDSON  
CHIEF JUDGE**

1 December 2003

Dawn M. Rivera, Esq.  
Melville & Johnson, P.C.  
44 Broad Street, N.W.  
Suite 222, The Grant Building  
Atlanta, Georgia 30303

Dear Ms. Rivera:

Thank you again for your letter of 19 November. I am writing to reply.

I have gone over the file. I am inclined to think it is very possible that your client is precluded from proceeding further with her complaint under the Employment Dispute Resolution Plan by virtue of having abandoned or waived—mainly by delay—her claims during the process. I am inclined to think it is also very possible that your client's claims and issues are precluded by virtue of her parallel assertion under the Adverse Personnel Action Policy, which has been heard and concluded. But I reserve judgment on these points.

Instead, out of an effort to be abundantly fair to your client, I am asking Judge Brill to review your client's EDR assertions in the light of the pertinent EDR Plan and the Adverse Personnel Action hearing to determine whether



## APPENDIX — 14-A

there are questions properly presented and maintained in the EDR proceeding that are not precluded. If Judge Brill concludes that live questions remain per EDR, then I ask Judge Brill to hold an appropriate hearing on these questions and give me her independent view of their merits.

At the conclusion of the next hearing—if Judge Brill determines that such a hearing is necessary—then I would want to have Judge Brill's judgment and findings on each and every question that has not yet been answered. If Judge Brill concludes no live questions remain to be heard, I ask her to advise me of that conclusion in writing. Most important, I would want Judge Brill's decision considering the EDR Plan, on whether your client's employment is now ripe to be legitimately terminated without delay.

Sincerely,

/s/ J.L. Edmondson

J.L. EDMONDSON

Chief of the Eleventh

Copies to:

Honorable Gerrilyn G. Brill  
Jeffrey O. Bramlett, Esq.  
Naomi Godfrey, Esq.  
Ms. Evelyn Johnson

APPENDIX — 14-A

UNITED STATES COURT OF APPEALS  
ELEVENTH CIRCUIT

---

Room 416, 56 Forsyth Street  
Atlanta, Georgia 30303

J.L. EDMONDSON  
CHIEF JUDGE

1 December 2003

Honorable Gerrilyn G. Brill  
United States Magistrate Judge  
United States District Court  
1690 Richard B. Russell Federal Building  
75 Spring Street, S.W.  
Atlanta, Georgia 30303-3361

Re: Evelyn Johnson

Dear Judge Brill:

Thank you for the work that you have done on this employment matter. Your efforts are a real help to me and to this Court.

A question has arisen about whether the decision on the Adverse Action Proceeding effectively ruled on all of Ms. Johnson's claims and contentions dealing with her employment here at the Court of Appeals.

I am enclosing a copy of a letter from me to Ms. Johnson's counsel. In the letter, I indicate that I am asking you to determine whether there are any live issues left to prevent Ms. Johnson's employment from being terminated. By this letter, I request that you take up the matter, to

**APPENDIX — 14-A**

conduct whatever hearing or hearings seem appropriate and to make the findings necessary to bring this matter to a conclusion.

Faithfully yours,

/s/ Larry

**J.L. EDMONDSON**  
Chief of the Eleventh

**Copy:**

Jeffrey O. Bramlett, Esq.  
Naomi Godfrey, Esq.  
Dawn M. Rivera, Esq.  
Ms. Evelyn Johnson

**Enclosure:**

Letter from Ms. Rivera of 11/19/03

**APPENDIX — 14-A**

**UNITED STATES COURT OF APPEALS  
ELEVENTH CIRCUIT  
Staff Attorneys' Office  
56 Forsyth Street, N.W.  
Atlanta, Georgia 30303-2289**

**November 19, 2003**

**Ms. Evelyn Johnson  
6241 S. Skyline Drive  
Douglasville, Georgia 30135**

**Dear Ms. Johnson:**

I have received a letter from Chief Judge Edmondson dated November 13, 2003 (enclosure), approving the termination of your employment with this office. As you know, you have been on leave without pay since July 2, 2003.

By this letter, I report that necessary administrative actions have been completed to close out your employment effective Friday, November 14, 2003. Your separation package is enclosed, along with copies of the appropriate documents including a record of leave statement. Please sign the enclosed separation check list and return in the self-addressed, stamped envelope.

At your convenience, but by the close of business on Tuesday, December 2, 2003, I ask that you contact Karen Sinyard, Administrative Manager, (at 404/335-6437) and make arrangements to remove any personal items from your former desk and office and to return to her any government keys, or other government property. Ms. Sinyard will be available to facilitate this final out processing.

At that time, please also return the Gateway 233 computer, serial#7841570, Gateway 15" color monitor, serial

## APPENDIX — 14-A

#8718694, Hewlett Packard Laser Jet 3P printer, serial #3103JG2UAD, and the keyboard and mouse that you were issued for home use.

We wish you the very best in your future endeavors.

Sincerely,

/s/ Naomi G. Godfrey

Naomi G. Godfrey

Senior Staff Attorney

c: The Honorable J.L. Edmondson, w/o enclosures  
Mr. Jeff Bramlett, w/o enclosures  
Mr. Ronan Doherty, w/o enclosures  
Ms. Dawn Rivera, w/o enclosures  
Mr. Norman Zoller, w/o enclosures  
Ms. Cheryl Vessels, w/o enclosures

Enclosures

**APPENDIX — 14-A**

**RECORD OF LEAVE DATA (SF-1150)**

1. Name (Last, First, Middle)

Johnson, Evelyn L.

2. Social Security Number

231-11-0983

3. N/A

4. Date and Nature of Separation

— 356-E Termination/Involuntary,  
November 14, 2003 -COB

5.A., B., C. — N/A

6. Total Service for Leave

More than 15 years

SCD 07/08/1982

**SUMMARY OF ANNUAL  
AND SICK LEAVE**

| 7. Carryover<br>Balance | MO | DAY | YEAR | HOURS |    |
|-------------------------|----|-----|------|-------|----|
|                         |    |     |      | A     | S  |
| From Prior Leave        | 01 | 12  | 03   | 78    | 75 |
| Year Ending             | 11 | 16  | 03   |       |    |

**HOURS  
ANNUAL SICK RESTORED**

8. CURRENT LEAVE

|              |     |    |   |
|--------------|-----|----|---|
| YEAR ACCRUAL | 176 | 88 | 0 |
|--------------|-----|----|---|

9. TOTAL

|     |     |
|-----|-----|
| 254 | 163 |
|-----|-----|

10. REDUCTION

|    |    |   |
|----|----|---|
| 72 | 36 | 0 |
|----|----|---|

## APPENDIX — 14-A

11. TOTAL LEAVE  
TAKEN                      97                      76      0
12. BALANCE                      85                      51      0
13. TOTAL HOURS PAID IN LUMP SUM \*85
- 14.; 15.A, B.; C.; 16.; 17.A, B.; 18; 19; 20; 21; 22; 23—N/A
24. REMARKS.

Mrs. Johnson has been on continuous LWOP since July 2, 2003, and therefore did not accrue leave during leave periods 14 through 22. (See Petitioner's note below).

\* Please pay Mrs. Johnson for 85 hours of unused annual leave.

25. Certified Correct by: (Signature)  
/s/ Naomi G. Godfrey

26. Senior Staff Attorney, U.S. Court of Appeals, Eleventh Circuit, 56 Forsyth Street, N.W. Atlanta, Georgia 30303  
Tel: (404) 335-6411

27. Date 11/19/03

Standard Form 1150  
Civil Service Commission

[PETITIONER'S NOTE: The remarks on number 24 was incorrect because as the personnelist who used to do this work, Petitioner knows that an employee who was on leave-without-pay status earns annual and sick leave on prorated basis].

APPENDIX — 14-A

UNITED STATES COURT OF APPEALS  
ELEVENTH CIRCUIT  
Staff Attorneys' Office  
56 Forsyth Street, N.W.  
Atlanta, Georgia 30303-2289

November 19, 2003

Evelyn Johnson  
6241 S. Skyline Drive  
Douglasville, Georgia 30135

RE: Health Insurance Program

Dear Ms. Johnson:

Your coverage in the Federal Employees Health Benefits Program (FEHB) ended on the last day of the pay period in which you separated from Federal service (November 16, 2003). Your coverage is automatically temporarily extended for 31 days after that date (at no cost to you)—no action is required on your part.

You also have the right to continue temporarily your FEHB coverage for up to 18 months after your separation instead of converting to nongroup coverage at this time. You may select any plan in the FEHB program in which to continue your coverage if you are eligible to enroll in the plan. To continue your coverage, you must pay the full amount of the premium (both of the employee and government shares) plus a two percent administrative charge. If you choose to continue your coverage during the first 31 days, you have the free coverage described above. Your enrollment charges begin on the day after the 31-day period of free coverage ends. If you continue the coverage to the end of the 18-month period, you will have another 31-day temporary extension of coverage for conversion to a nongroup contract.



## APPENDIX — 14-A

A registration form and detailed information about your opportunity to continue coverage is enclosed. You may get additional information by calling Cheryl Vessels, Human Resources Manager, Eleventh Circuit Court of Appeals, 404-335-6212, or me at (404) 335-6311.

If you want to continue your coverage, your registration form must be received at the address shown below within 60 days after the date of your separation, or the date you receive this notice, whichever is later. Bring or mail your registration form to:

Jacqueline K. Williams \*  
Eleventh Circuit Court of Appeals  
Staff Attorneys' Office  
56 Forsyth Street, N.W.  
Atlanta, Georgia 30303-2289

**IMPORTANT! PLEASE DO NOT SUBMIT PAYMENT** with your registration form. You will be billed later.

Sincerely,

/s/ Jacqueline K. Williams  
Jacqueline K. Williams

Enclosures

**\* [PETITIONER'S NOTE:** The employee who signed this letter, other administrative matters related to personnel performed by the Petitioner, are presently performed by the undersigned, Jacqueline Williams, female, black. Sara Gilibert, female, white, whose job is the administrative work in recruiting of staff attorneys, performs the other part of the duties formerly performed by the Petitioner. Although Sara Gilibert has the title of manager for recruiting, she does not have the decision-making responsibility (as the Petitioner) in selecting the staff attorneys for the vacant staff attorney positions, since Naomi Godfrey retained the responsibility of

## APPENDIX — 14-A

having the final say who to hire. As alleged in the Petitioner's contentions, these adverse personnel actions toward the Petitioner show Naomi Godfrey's malicious and evil intention of retaliatorily terminating the Petitioner in order to replace her with a black and a white employees, to perform the duties Petitioner singlehandedly performed in 3 ½ years without added compensation, and firing the Petitioner without cause but for filing the EDR complaint of intentional discrimination and disparate treatment due to non promotion.]

APPENDIX — 14-A

UNITED STATES COURT OF APPEALS  
ELEVENTH CIRCUIT

---

Room 416, 56 Forsyth Street  
Atlanta, Georgia 30303

J.L. EDMONDSON  
CHIEF JUDGE

17 November 2003

Honorable Gerrilyn G. Brill  
United States Magistrate Judge  
United States District Court  
1690 Richard B. Russell Federal Building  
75 Spring Street, S.W.  
Atlanta, Georgia 30303-3361

Re: Evelyn Johnson Adverse Personnel Action  
Policy Heard 29 October 2003

Dear Judge Brill:

In connection with the request for adverse action hearing by an employee of this Court's Staff Attorneys' Office, enclosed is a copy of a letter to the Senior Staff Attorney, Naomi Godfrey, dated 13 November 2003, authorizing Ms. Godfrey to take the steps necessary and proper in accordance with Court policy to terminate Ms. Johnson's employment.

I appreciate your hearing this matter.

Faithfully yours,

/s/ Larry  
J.L. Edmondson  
Chief of the Eleventh

Copy to: Jeffrey O. Bramlett, Esq. Evelyn Johnson  
Naomi Godfrey, Esq. Dawn M. Rivera, Esq.

**APPENDIX — 14-A**

**UNITED STATES COURT OF APPEALS  
ELEVENTH CIRCUIT**

---

Room 416, 56 Forsyth Street  
Atlanta, Georgia 30303

**J.L. EDMONDSON  
CHIEF JUDGE**

13, November 2003

Ms. Naomi G. Godfrey  
Senior Staff Attorney  
United States Court of Appeals  
Eleventh Judicial Circuit  
56 Forsyth Street, N.W.  
Atlanta, Georgia 30303

Dear Mrs. Godfrey:

I have accepted Magistrate Judge Gerrilyn Brill's written decision of 6 November 2003, and the accompanying transcript denying Evelyn Johnson's request for relief under the Court's Adverse Personnel Action Policy and approving the termination of her employment.

In the light of this final decision and your earlier recommendation, you are hereby authorized to take those steps necessary and proper in accordance with existing Court policy to terminate Ms. Johnson's employment without delay. The decision by Judge Brill also takes into account the request for a second attempt by Ms. Johnson on 16 July 2003, to seek consideration or relief under the Court's Employment Dispute Resolution Plan. Please consult with the Court's Human Resources Manager, if necessary, concerning final employee termination arrangements and AO paperwork.

**APPENDIX — 14-A**

Faithfully yours,

/s/ Larry  
J.L. Edmondson  
Chief of the Eleventh

**/kda (PETITIONER'S NOTE: Typist of this letter (Kathryn L. Atkins), signed by Judge Edmondson, was the Circuit Executive, Norman Zoller's, secretary.).**

**c: Mr. Jeffrey O. Bramlett  
Mr. Ronan P. Doherty  
Ms. Dawn M. Rivera  
Ms. Cheryl Vessels  
Mr. Norman E. Zoller**

APPENDIX — 15-A

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
1690 U.S. Courthouse Building  
75 Spring Street, S.W.  
ATLANTA, GEORGIA 30303-3361

Gerrilyn G. Brill  
United States  
Magistrate Judge

TEL (404) 215-1365  
FAX (404) 215-1564

December 17, 2003

Hon. J. L. Edmondson, Chief Judge  
United States Court of Appeals  
for the Eleventh Circuit  
56 Forsyth Street  
Atlanta, Georgia 30303

Re: October 27, 2003 EDR Complaint of Evelyn L.  
Johnson

Dear Judge Edmondson:

Enclosed please find my decision in the above-referenced matter. I am also enclosing three documents that were submitted by the parties in connection with the EDR Proceeding. The transcript of the December 8, 2003 hearing has been ordered but has not yet been completed. I will forward a copy of the transcript to you as soon as it is ready.

Yours truly,

/s/ Gerrilyn G. Brill  
Gerrilyn G. Brill  
UNITED STATES  
MAGISTRATE JUDGE

## APPENDIX — 15-A

### ENCLOSURES

cc: Ms. Naomi Godfrey  
VIA FAX (w/o Encl.)  
Mr. Norman E. Zoeller  
VIA FAX (w/o Encl.)  
Ms. Dawn M. Rivera  
VIA FAX (w/o Encl.)  
Mr. Ronan P. Doherty  
VIA FAX (w/o Encl.)  
Mr. Jeffrey O. Bramlett  
VIA FAX (w/o Enc.)



APPENDIX — 15-A

UNITED STATES COURT OF APPEALS  
EMPLOYMENT DISPUTE RESOLUTION PLAN  
PROCEEDING

IN RE:           October 28, 2003 EDR Complaint of Evelyn  
                    Johnson

DECISION OF THE JUDICIAL OFFICER

This is a proceeding pursuant to the Eleventh Circuit Court of Appeals' Employment Dispute Resolution ("EDR") Plan. Evelyn Johnson ("Petitioner") filed an EDR complaint on October 27, 2003 contending that the Staff Attorney's Office for the Eleventh Circuit Court of Appeals ("SAO") wrongfully terminated her employment on the basis of her national origin (Filipino), "perceived disability," and in retaliation for her having filed a prior EDR Complaint. For the reasons discussed below, the Court finds that Petitioner's October 27, 2003 EDR Complaint is procedurally barred and, accordingly, should be **DISMISSED**. [Pet.'s Note: Petitioner filed the 2003 EDR complaint on July 16, 2003, NOT October 28, 2003. (See Appendix 16-A, Exhibit D1 Form)].

## APPENDIX — 15-A

### Procedural History

Petitioner began working for the SAO as an Administrative Assistant in January 1989. On June 20, 2003, SAO Senior Staff Attorney Naomi Godfrey wrote a letter to Petitioner informing her that she was being terminated.

On July 16, 2003, Petitioner through her counsel initiated the EDR process with respect to her termination by requesting a consultation with Robert Phelps, the Eleventh Circuits EDR Coordinator. See EDR Plan at Ch. VII, § 5(A). Mr. Phelps responded to Petitioner's request by letter dated July 22, 2003. The letter was sent to Petitioner's home address and was also copied to her attorney at that time, Mattie P. Johnson, in Washington, D.C.

In the letter, Mr. Phelps acknowledged receipt of Petitioner's request for consultation, and stated: "Before I am able to act further on this matter, I request that you consider and then, if you so decide, file with me a 'Waiver of Confidentiality' on the attached form." A copy of the form was attached to the letter. The letter concluded with the

## APPENDIX — 15-A

following statement: "Before I am able to assist you with the issue you raise . . . I will need to have a waiver from you. . . ." [Pet.'s Note: (See Phelps' letter to the Petitioner dated July 22, 2003, Appendix 3-B; see also Petitioner's Brief).].

Petitioner did not return the waiver of confidentiality form, and neither Petitioner nor her counsel contacted Mr. Phelps again prior to the expiration of the 30 day consultation period provided in Chapter VII, Section 5(D) of the EDR Plan. On August 18, 2003, Mr. Phelps sent a letter to Petitioner and to Dawn Rivera, Petitioner's new counsel, informing them that he was "closing (Petitioner's) file without action" because the 30-day consultation period had expired without any further contact from Petitioner. [Pet.'s Note: As specifically stated on the Petitioner's Exh. D1 Form Fax transmittal, all contacts should be directed to the counsel, but Phelps failed to notify Petitioner's counsel, whose practice is in Washington, D.C. (Id.; see also note on the Fax transmittal).].

On September 12, 2003, Petitioner's attorney sent a

## APPENDIX — 15-A

letter to Mr. Phelps enclosing a completed Request for Mediation form and asking Mr. Phelps to address Petitioner's EDR claims. Mr. Phelps replied that he was without authority to proceed further on the EDR claims because both the consultation and mediation periods had expired.

On October 27, 2003, Petitioner filed her EDR Complaint with the Chief Judge of the Eleventh Circuit pursuant to Chapter VII, Section 7 (A) of the EDR Plan. On December 1, 2003, Chief Judge J. L. Edmondson requested that the undersigned Magistrate Judge resolve any remaining issues that might be pending with respect to Petitioner's October 27, 2003 complaint. On December 8, 2003, both parties appeared before the undersigned to address the viability of Petitioner's October 27, 2003 EDR Complaint. The Court heard argument from counsel for both sides, and also heard the testimony of Mr. Phelps, who was called by the SAO to address whether Petitioner's EDR complaint was procedurally barred. [Pet.'s Note: Petitioner was never notified personally or through

## APPENDIX — 15-A

counsel to be present at the “conference” in order to challenge Mr. Phelps, EDR coordinator, (Respondents’ witness ) testimony.].

At the conclusion of the hearing, the Court asked counsel for both sides whether there was any additional evidence or argument they wished to present before the Court decided whether Petitioner’s EDR complaint was procedurally barred. Counsel for both sides responded that they believed the record was complete with respect to that issue.<sup>1</sup>

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<sup>1</sup> After the Court had drafted its opinion on the procedural bar question, but before the decision was issued, counsel for Petitioner submitted a document entitled “Complainant’s Objection to Hearing Held Without Notice.” In the document, Petitioner argues that her due process rights were violated because she did not receive prior notice of the December 8, 2003 hearing, either “personally or through her counsel. . . .” It is unclear why Petitioner’s counsel did not inform Petitioner of the hearing, given that (1) Ms. Rivera admits she was told about the hearing on December 4, 2003; and (2) The Preamble to the Eleventh Circuit EDR Plan provides that, it was the attorneys, not the Court, that suggested December 8, 2003 as a mutually acceptable date for the hearing. In any event, Petitioner does not state in the document how she was prejudiced by the alleged lack of notice, or what evidence she would present if the record were reopened. Petitioner’s counsel was present at the hearing, gave argument and actively cross-examined Mr. Phelps on Petitioner’s behalf, and specifically stated in response to the Court’s question that no additional evidence or testimony was needed before the Court decided the procedural bar issue. Given these facts, the Court rejects Petitioner’s due process argument.

[Pet.’s Note: It was very clear from the *Objection to Hearing Held Without Notice Motion* (Appendix 18-A) filed by

## APPENDIX — 15-A

### Discussion

[a]ny complaint filed after the effective date of this Plan [January 1, 1999] shall be processed under the provisions of this Plan regardless of whether the actions giving rise to such a complaint may have occurred before the effective date of this Plan.

EDR Plan, Ch. I, §; see also Ch. IX, § 3. The Preamble further provides that the EDR Plan is "intended to be the

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Petitioner's counsel on December 12, 2003, how the Respondents through SAO counsel and the designated judicial officer, Judge Brill, handled the December 8, 2003, EDR hearing. The opposing party deceived the Petitioner's counsel by asking her for a "telephone conference with Judge Brill regarding whether any issues remained unresolved in this matter." Counsel for Ms. Johnson advised SAO counsel that Ms. Johnson was unavailable since the Thanksgiving holiday and was assured that it would be unnecessary for Ms. Johnson to participate in the conference. . . . "On Friday, December 5, 2003, SAO counsel contacted counsel for Ms. Johnson to advise that Judge Brill wished to hold the conference in chambers, instead via telephone." Upon arrival of Petitioner's counsel in chambers, however, she "discovered that Judge Brill had convened a hearing, with a court reporter and a witness produced by SAO."

The court's rejection of Petitioner's due process argument was prejudicial due to the fact that the SAO's counsel tricked and deceived Petitioner's counsel, which led Petitioner Counsel to believe that the "telephone conference" was an informal phone discussion "whether any issues remained unresolved in this matter." Notwithstanding the hearing held on December 8, 2003, it was held in bad faith due to the element of deception to relieve the SAO of any legal responsibility and accountability due the Petitioner.



## APPENDIX — 15-A

exclusive remedy for employees with respect to the rights and protections afforded;" that is, with respect to claims of race, color, religion, disability, sex, national origin, and/or age discrimination in the workplace.<sup>2</sup> See EDR Plan, Ch. 1, § 1.

As noted above, the EDR Plan sets forth a specific process that must be followed by a claimant before she may request a court hearing on her discrimination claim. First, the claimant must make a written request for consultation with the Eleventh Circuit's EDR Ch. VI, § 5A ("An employee who believes that his or her rights under this plan have been violated must first request consultation with ... the Court's EDR Coordinator....") (Emphasis added); see also EDR Plan at Ch. VII, §§ (B) (3) and 5 (D) (establishing 30-day time period). [Pet.'s Note: Petitioner filed a written request for consultation on July 16, 2003, through the EDR coordinator, several days before the deadline,

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<sup>2</sup>This protection differentiates the EDR Plan from the Eleventh Circuit's Adverse Personnel Action Policy, which governs workplace grievances that are not alleged to have been motivated by a discriminatory or retaliatory intent.



## APPENDIX — 15-A

### Appendix 16-A.].

Second, the claimant may make a written request for mediation within 14 days after receiving notice that the consultation period has expired. See EDR Plan, Ch. VII. § 6 (A). Chapter VII, Section 6(A) of the EDR Plan makes it clear that a claimant's failure to meet this deadline will result in her claim being procedurally barred from further prosecution: "Failure to pursue mediation will preclude further processing of the employee's claim under any other provisions of [the EDR Plan." Id. (Emphasis added).

In the present case, it is undisputed that on August 18, 2003, Mr. Phelps gave Petitioner and her counsel written notice that the consultation had expired. See August 18, 2003, letter attached to Petitioner's Motion for EDR Hearing (stating that "[t]he thirty day time frame for consultation . . . has passed. . . .") Under Chapter VII, Section 6(A) of the EDR Plan, Petitioner's written request for mediation was due (assuming three days for mailing) no later than September 4, 2003. However, Petitioner did not submit a mediation request until September 12, 2003.

## APPENDIX — 15-A

Because Petitioner did not comply with the deadline for requesting mediation, and there is no evidence in the record that Petitioner requested an extension of the deadline before the mediation period expired, the Court finds that Petitioner's claim is procedurally barred pursuant to Chapter VII, Section 6(A) of the Eleventh Circuit's EDR Plan.

At the December 8, 2003 hearing, counsel for Petitioner argued that Mr. Phelps did not provide her with a copy of the EDR Plan until September 9, 2003, and did not provide her with a mediation form until a few days later. (See also Petitioner's Motion for EDR Hearing at p. 4). Thus, Ms. Rivera suggested that Petitioner was not in a position to comply with the EDR deadlines until after September 9, 2003. The Court is not persuaded by this argument. The record indicates that Petitioner was given a copy of the EDR Plan, including all relevant forms, when she began her employment with the SAO. Moreover, the record shows that Petitioner clearly understood the EDR Plan and process. Mr. Phelps testified that Petitioner had personally participated in both consultation and mediation with the SAO less than

## APPENDIX — 15-A

a year before, in connection with another EDR complaint that she had filed. Petitioner's counsel made timely requests for mediation and consultation in that EDR action, and the Court sees no reason why she could not have met the same deadlines in this case.

### Conclusion

For the reasons set forth above, the Court Concludes that Petitioner's July 16, 2003 complaint is procedurally barred and should be **DISMISSED**. The Court is not aware of any other live issues pending in this matter.

In chambers, Atlanta, Georgia this 17<sup>th</sup> day of December 2003.

/s/ Gerrilyn G. Brill  
GERRILYN G. BRILL  
UNITED STATES MAGISTRATE JUDGE  
(Designated Judicial Hearing Officer)

**APPENDIX — 15-A**

**UNITED STATES COURT OF APPEALS  
ELEVENTH CIRCUIT**

---

Room 416, 56 Forsyth Street  
Atlanta, Georgia 30303

**J. L. EDMONDSON**  
Chief Judge

17 November 2003

Honorable Gerrilyn G. Brill  
United States Magistrate Judge  
United States District Court  
1690 Richard B. Russell Federal Building  
75 Spring Street, S.W.  
Atlanta, Georgia 30303-3361

**Re: Evelyn Johnson Adverse Personnel Action  
Policy Heard 29 October 2003**

Dear Judge Brill:

In connection with the request for adverse action hearing by an employee of this Court's Staff Attorney's Office, enclosed is a copy of a letter to the Senior Staff Attorney, Naomi Godfrey, dated 13 November 2003, authorizing Ms. Godfrey to take the steps that are necessary and proper in accordance with the Court policy to terminate Ms. Johnson's employment.

I appreciate your hearing this matter.

Faithfully yours,

**APPENDIX — 15-A**

/s/ Larry  
J. L. Edmondson  
Chief of the Eleventh

**Copy:**

Mr. Jeffrey O. Bramlett, Esq.  
Ms. Naomi Godfrey, Esq.  
Ms. Evelyn Johnson  
Ms. Dawn M. Rivera, Esq.

**APPENDIX — 15-A**

**UNITED STATES COURT OF APPEALS  
ELEVENTH CIRCUIT**

---

Room 416, 56 Forsyth Street  
Atlanta, Georgia 30303

**J. L. EDMONDSON**  
Chief Judge

13 November 2003

Ms. Naomi G. Godfrey  
Senior Staff Attorney  
United States Court of Appeals  
Eleventh Judicial Circuit  
56 Forsyth Street, N.W.  
Atlanta, Georgia 30303

Dear Ms. Godfrey:

I have accepted Magistrate Judge Gerrilyn Brill's written decision of 6 November 2003, and the accompanying transcript denying Evelyn Johnson's request for relief under the Court's Adverse Personnel Action Policy and approving the termination of her employment.

In the light of this final decision and your earlier recommendation, you are hereby authorized to take those steps necessary and proper in accordance with existing Court policy to terminate Ms. Johnson's employment without delay. The decision by Judge Brill also takes into account the request for a second attempt by Ms. Johnson on 16 July 2003, to seek consideration or relief under the Court's Employment Dispute Resolution Plan. Please consult with the Court's Human Resources Manager, if necessary,

## APPENDIX — 15-A

concerning final employee termination arrangements and AO paperwork.

Faithfully yours,

/s/ Larry

J. L. Edmondson

Chief of the Eleventh

/kla

c: Mr. Jeffrey O. Bramlett  
Mr. Ronan P. Doherty  
Ms. Dawn M. Rivera  
Ms. Cheryl Vessels  
Mr. Norman E. Zoller



**APPENDIX — 15-A**

**UNITED STATES COURT OF APPEALS  
ELEVENTH CIRCUIT  
STAFF ATTORNEYS OFFICE**

November 19, 2003

Ms. Evelyn Johnson  
6241 South Skyline Drive  
Douglasville, Georgia 30135

Dear Ms. Johnson:

I have received a letter from Chief Judge Edmondson dated November 13, 2003 (enclosure), approving the termination of your employment with this office. As you know, you have been on leave without pay since July 2, 2003.

By this letter, I report that necessary administrative actions have been completed to close out your employment effective Friday, November 14, 2003. Your separation package is enclosed, along with copies of the appropriate documents including a record of leave statement. Please sign the enclosed separation check list and return in the self-addressed stamped envelope.

As per your convenience, but by the close of business on Tuesday, December 2, 2003, I ask you contact Karen Sinyard, Administrative Manager, (at 404/335-6437) and make arrangements to remove any personal items from your former desk and office and to return to her any government keys, or other government property. Ms. Sinyard will be available to facilitate this final out processing.

At that time, please also return the Gateway 233 computer, serial #7841570, Gateway 15" color monitor, serial

## APPENDIX — 15-A

#8718694, Hewlett Packard Laser Jet 3P printer serial #3103JG2UAD, and the keyboard and mouse that you were issued for home use.

We wish the very best in your future endeavors.

Sincerely,

/s/ Naomi G. Godfrey  
Naomi G. Godfrey  
Senior Staff Attorney

c: The Honorable J. L. Edmondson,  
w/o enclosures  
Mr. Jeff Bramlett, w/o enclosures  
Mr. Ronan Doherty, w/o enclosures  
Ms. Dawn Rivera, w/o enclosures  
Mr. Norman Zoller, w/o enclosures  
Ms. Cheryl Vessels, w/o enclosures

Enclosures

# APPENDIX — 15-A

## RECORD OF LEAVE DATA Standard Form 1150

1. Name (Last, First, Middle)  
Johnson, Evelyn L.
2. Social Security Number  
231-11-0983
3. N/A
4. Date and Nature of Separation  
— 356-E — Termination/Involuntary  
November 14, 2003 —COB
- 5.A., B., C. — N/A
6. Total Service for Leave  
More than 15 years  
  
SCD 07/08/1982

### SUMMARY OF ANNUAL AND SICK LEAVE

| 7. Carryover MO | DAY   | YEAR | HRS |    |            |
|-----------------|-------|------|-----|----|------------|
| Balance         |       |      | A   | S  | From Prior |
| Leave 01 12 03  |       |      |     |    |            |
| Year Ending     | 11 16 | 03   | 78  | 75 |            |

|          | HOURS  |      |
|----------|--------|------|
|          | ANNUAL | SICK |
| RESTORED |        |      |

|                  |     |    |   |
|------------------|-----|----|---|
| 8. CURRENT LEAVE |     |    |   |
| YEAR ACCRUAL     | 176 | 88 | 0 |

## APPENDIX — 15-A

|                          |     |     |   |
|--------------------------|-----|-----|---|
| 9. TOTAL                 | 254 | 163 |   |
| 10. REDUCTION            | 72  | 36  | 0 |
| 11. TOTAL LEAVE<br>TAKEN | 97  | 76  | 0 |
| 12. BALANCE              | 85  | 51  | 0 |

13. TOTAL HOURS PAID IN LUMP SUM \*85

14.; 15.A, B., C.; 16.; 17.A, B.; 18; 19; 20; 21; 22; 23—N/A

24. REMARKS.

Mrs. Johnson has been on continuous LWOP since July 2, 2003, and therefore did not accrue leave during leave periods 14 through 22. (See Petitioner's note below).

\* Please pay Mrs. Johnson for 85 hours of unused annual leave.

25. Certified Correct by: (Signature)  
/s/ Naomi G. Godfrey

26. Senior Staff Attorney, U.S. Court of Appeals, Eleventh Circuit, 56 Forayth Street, N.W. Atlanta, Georgia 30303  
Tel: (404) 335-6411

27. Date 11/19/03 Standard Form 1150  
Civil Service Commission

(PETITIONER'S NOTE: The remarks on number 24 was incorrect because as the personnelist who used to do this work, Petitioner knows that an employee who was on leave-without-pay status earns annual and sick leave on prorated basis.).

**COMPLAINT AND CONSULTATION  
(CONFIDENTIAL)**

TO: EDR/Alternate EDR Coordinator  
Robert Phelps  
Name

FROM: Evelyn L. Johnson  
[Complainant]

- I. A. Address: 6241 S. Skyline Drive  
Douglasville, GA 30135
- B. Work Phone: N/A Home Phone: 770-489-0343
- C. If you are now a court employee, state job title and pay classification of your job:

HR Coordinator, CPS CL 26/42, prior to receiving the involuntary termination letter dated June 20, 2003; although letter dated July 10, 2003, addressed to me stated extending my employment with the SAO through the conclusion of the adverse action (retaliation), referenced letter did not specifically state rescinding the employment termination.

- II. A. For a complaint alleging discrimination, check and identify as many categories are applicable:

☒ Race ☒ Color ☒ National Origin  
☒ Age ☒ Religion ☒ Gender  
☒ Handicap

B(1). Date(s) of alleged discrimination:

June 20, 2003, involuntary termination letter, construed as a continuing retaliatory action, as a result of

## APPENDIX — 16-A

participating in a federally protected activity; i.e., March 12, 2002, filing of EDR complaint under Title VII. The retaliatory actions consisted of: (1) June 20, 2003, involuntary termination of tenured federal employment; (2) March 12, 2003, referral to EAP memo from Sara Gilibert; (3) March '7, 10, 6-7 & February 24-25, 2003, e-mails notifying Norman Zoller of being singled-out by computer monitoring to intimidate, harass, and demoralize me daily; (4) February 5, 2003, two adverse memos from Sara Gilibert; (7) September 2, and August 29, 2002, leave charged (sick) and approved under FMLA for two other employees whose family members underwent serious medical issues, but I was charged annual leave, discretionary decision and retaliatory; (8) May 6, 2002, adverse e-mail; (9) March 28-April 2, 2002, singled-out to document hourly and daily work performed while other support staff not asked to do the same; March 22-25, 2001, e-mails, first instance or retaliatory action occurred ten days after engaging in federally protected activity, i.e., filing of the EDR complaint.

B(2). Please identify by name and position the official(s) you believe discriminated against you:

Naomi G. Godfrey, Senior Staff Attorney; Karen Sinyard, Admin Manager; Sara Gilibert, SAO Manager for Recruiting; Norman Zoller, Circuit Executive; Mori Irvine, Judicial Division Manager; Brian Schumacher, Supervising Staff Attorney.

III. A. For all types of matters complained of (including complaints of discrimination), please briefly summarize the events or occurrences giving rise to your complaint, and how you believe you were improperly treated or treated differently from other employees or applicants. You should also specify here the portion (section) of the Employment Dispute Resolution Plan which specifies the right(s) you believe may have been violated:

**CHAPTER VII. Dispute Resolution Procedures, Section 10, Eleventh Circuit Court of Appeals Employment Dispute Resolution Plan, Section 2.1. Prohibition against retaliation.** "The Court, any court unit executive, or their assistants, shall not retaliate against, coerce or interfere with a complainant or anyone participating in the filing and processing of a complaint."

June 20, 2003—last adverse event or adverse (retaliatory) employment action. Reprisal/involuntary termination and continuing retaliatory actions as a result of the original Title VII complaint of intentional discrimination and disparate treatment filed under court EDR Plan. Less than sixty (60) days of entry of final judgment of the original complaint, I was handed an involuntary termination letter terminating my 14 ½ years of federal employment with the SAO and vested federal government employment for more than 21 years. The adverse employment action was in retaliation to the cause of action I chose in exercising my federal employment rights of participating in a federally protected activity by filing an EDR complaint due to non promotion, alteration of office policies and personnel pattern of practice, and other federal employment violations.

The adverse continuing retaliatory actions included: (1) involuntarily terminating my tenured federal employment without cause; (2) relinquishing of my duties and responsibilities beginning January 22, 2002 without cause; (3) pressuring to return to work while under undue work-related stress, including FMLA violations and leave usage; (4) accounting and timekeeping of daily logs of work performed; (5) singled-out by computer monitoring impeding my work; (6) harassment through computer, and hostile work environment by intimidation. The adverse actions caused catastrophic tangible and intangible damages, irreparable injury, jeopardized my entitlement to full benefits of Federal Employees Retirement System (FERS), and affected compensation, terms, conditions, or privileges of my employment.



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[you may attach up to one additional page  
as to this item, if necessary]

B. Corrective action sought by you:

Subject to appropriation, back pay and front pay, and  
associated benefits pursuant to 5 United States Code section  
5596. 5 U.S.C. § 5596.

C. Do you have an attorney or other person to  
represent you? ☒ Yes ☐ No

If yes, name and address of attorney or  
representative:

Mattie P. Johnson, Esq.  
Woodward Building 733 15<sup>th</sup> Street, NW, Suite 700  
Washington, D.C. 20005

/s/ Evelyn L. Johnson  
Signature

16 July 2003  
Date

**APPENDIX — 16-A**

**FAX TRANSMITTAL**

**TO:** Robert Phelps  
EDR Coordinator

**VIA:** Court HR Facsimile  
404-335-6132 and U.S. Mail

**FROM:** Evalyn L. Johnson

**DATE:** July 16, 2003

**SUBJECT:** Exhibit D1, Form 1 [1/99]  
EDR complaint form

**NO. OF PAGES INCLUDING THIS PAGE:** 3

**Please refer all inquiries to the retained  
counsel.**

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**CLEAR TECH DEVELOPMENT FAX:+7704890343**

**\*\* TRANSMIT CONF REPORT \*\***

**Jul 17 '03 23:52**

**CLEAR TECH DEVELOPMENT ----> 4043356132**

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| <b>No.</b>    | <b>002</b>       |
| <b>Mode</b>   | <b>Fine</b>      |
| <b>Pages</b>  | <b>3 Page(s)</b> |
| <b>Result</b> | <b>O K</b>       |

## APPENDIX — 17-A

### MERIT SYSTEMS PROTECTION BOARD APPEAL FORMS PACKAGE (MSPB Form 185)

#### Attachments Checklist

The forms in the MSPB Appeal Forms Package (MSBP Form 185) ask you to submit certain attachments with your appeal, depending on your answers to specific questions in the forms. This Attachments Checklist is intended to assist you in ensuring that all required attachments are submitted with your appeal. **Please submit only the attachments requested at this time.** You will be afforded the opportunity to submit detailed evidence in support of your appeal later in the proceeding.

#### MSBP Form 185-1 APPELLANT AND AGENCY INFORMATION

- ☐ Question 4-IF you answered "Yes," attach a completed Designation of Representative Form, MSBP Form 185-9.

#### MSBP Form 185-2 APPEAL OF AGENCY PERSONNEL ACTION OR DECISION (Non-retirement)

- ☐ Question 1-IF an SF-50 is available for the personnel action or decision, attach it. DO NOT delay filing your appeal if the SF-50 is not available; you may submit it later.
- ☐ Question 2-IF you received a proposal letter for the personnel action or decision, attach it.
- ☐ Question 3-IF you received a final decision letter for the personnel action or decision, attach it.
- ☐ Question 5-IF you answered "Yes," attach a copy of the agreement between you and the agency to try to resolve the matter through an alternative dispute resolution (ADR) process.

## APPENDIX — 17-A

- ☐ Question 8-IF you answered "Yes," attach a copy of the grievance.
- ☐ Question 10-IF you answered "Yes," attach a copy of the decision on the grievance.

### **MSPB Form 185-3 APPEAL OF OPM OR AGENCY RETIREMENT DECISION OR ACTION**

- ☐ Question 6-IF you answered "Yes," attach a copy of the OPM final or reconsideration decision.
- ☐ Question 7-IF you answered "Yes," attach a copy of the agency decision.

### **MSPB Form 185-4A CLAIMS OF MISTAKES IN PROCEDURES OR VIOLATIONS OF LAW**

No attachments required.

### **MSPB Form 185-4B CLAIMS OF PROHIBITED DISCRIMINATION**

- ☐ Question 2-IF you answered "Yes," attach a copy of the formal discrimination complaint filed with the agency.
- ☐ Question 5-IF you answered "Yes," attach a copy of the decision on the discrimination complaint.

### **MSPB Form 185-4C CLAIMS OF PROHIBITED PERSONNEL PRACTICES**

No attachments required.

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## **MERIT SYSTEMS PROTECTION BOARD APPEAL FORMS PACKAGE (MSPB Form 185)**

### **Attachments Checklist**

### **MSPB Form 185-5 WHISTLEBLOWER CLAIMS OR**

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### **INDIVIDUAL RIGHT OF ACTION (IRA) APPEAL**

- ☐ Question 1-IF you made a protected disclosure in writing, attach a copy of it.
- ☐ Questions 1 through 4-IF you filed a complaint with the Office of Special Counsel (OSC) before filing your appeal, you may attach a copy of Part 2 of Form OSC-11(8/00) to provide the information requested in these questions.
- ☐ Question 4-FOR IRA APPEAL ONLY-IF you received a proposal letter, decision letter, and/or SF-50 for the agency action or decision on which your whistleblower claim is based, attach it/them.
- ☐ Question 6-IF you filed a complaint with the Office of Special Counsel (OSC) before filing your appeal, attach a copy of your request to OSC for corrective action. IF you are attaching a copy of Part 2 of Forms OSC-11 (8/00), that attachment provides the information requested in this question.
- ☐ Question 8-IF you answered "Yes," attach a copy of the OSC notice informing you of your right to appeal to the MSPB.
- ☐ Question 11-IF you previously filed a stay request with the MSPB, attach a copy of it.
- ☐ Question 13-IF you answered "Yes," attach a copy of the decision on the stay request.

### **MSPB Form 185-6 WHISTLEBLOWER STAY REQUEST**

- ☐ Attach a Certificate of Service specifying how and when your stay request was served on the agency. Attach any documentary evidence that supports your stay request.

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### **MSPB Form 185-7 USERRA CLAIMS OR USERRA APPEAL**

- ☐ Question 4-FOR USERRA APPEAL ONLY-IF you received a proposal letter, decision letter, and/or SF-50 for any agency action or decision associated with your claim of a USERRA violation, attach it/them.
- ☐ Question 6-IF you filed a USERRA complaint with the Secretary of Labor, attach a copy of it.
- ☐ Question 7-IF you answered "Yes," attach a copy of the notice you received from the Secretary of Labor.
- ☐ Question 9-IF you answered "Yes," attach EITHER a completed MSPB Form 185-9 if OSC is representing you OR a copy of the OSC letter declining to represent you, whichever applies.

### **MSPB Form 185-8 VETERANS PREFERENCE CLAIMS OR VEOA APPEAL**

- ☐ Question 5-FOR VEOA APPEAL ONLY-IF you received a proposal letter, decision letter, and/or SF-50 for any agency action or decision associated with your claim of a veterans' preference violation, attach it/them.
  - ☐ Question 7-FOR VEOA APPEAL ONLY-Attach a copy of the VEOA complaint filed with the Secretary of Labor.
  - ☐ Question 8-FOR VEOA APPEAL ONLY-Attach EITHER a copy of the notice you received from the Secretary of Labor that your VEOA complaint could not be resolved OR a copy of your notice to the Secretary stating your intent to appeal to the Board, whichever applies.
-



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**MERIT SYSTEMS PROTECTION BOARD FORM  
185-1**

**APPEAL FORM - APPELLANT AND AGENCY  
INFORMATION**

---

1. Name (last, first, middle initial  
**Johnson, Evelyn L.**

---

2. Present address (number and street, city, State, and Zip  
Code

**You must notify the Board in writing of any change in  
your mailing address while your appeal is pending.**

Address: **6241 South Skyline Drive**

Address:

City, State, Zip Code: **Douglasville, Georgia 30135**

---

3. Telephone Numbers (include area code) and E-Mail  
Address

**You must notify the Board in writing of any change in  
your telephone number(s) or e-mail address while  
your appeal is pending.**

Home: **(770) 489-0343**

Work: **(404) 335-6411**

FAX: **(770) 489-0343**

Other: **(404)402-3578 (Cell)**

E-mail Address: **<Lady1Bug@aol.com>**

---

4. Do you wish to designate an individual or organization  
to represent you in this proceeding before the Board? (You  
may designate a representative at any time. However, the  
processing of your appeal will not normally be delayed  
because of any difficulty you may have in obtaining a  
representative.)

## APPENDIX — 17-A

☐ Yes (Complete and attach MSPB Form 185-9, Designation of Representative Form)

☐ No

5. Name and address of the agency that took the action you are appealing (include bureau or division, street address, city, State and Zip code)

Agency Name: United States Court of Appeals for  
the Eleventh Circuit  
Bureau: Staff Attorney's Office  
Address: 56 Forsyth Street, N.W.  
City, State, Atlanta, Georgia  
Zip Code: 30303-2289

6. Your employment status at the time of the action being appealed:

☒ Permanent ☐ Temporary ☐ Term  
☐ Seasonal ☐ Applicant ☐ Retired

7. Type of appointment (if applicable)

☐ Competitive ☐ Excepted ☒ SES  
☐ Postal Service ☐ Other

8. Your position, title, grade, and duty station at the time of the action being appealed (if applicable):

Position:

Title: **Human Resources Coordinator**

Grade: **CPS CL 26/42**

Duty Station: **Atlanta, Georgia**

9. Are you entitled to veterans' preference?

**See 5 U.S.C. 2108**

☐ Yes ☒ No

10. Length of Government service (if applicable):

**21 years and 2 months**

**APPENDIX — 17-A**

11. Length of service with acting agency (if applicable): **14 years and 9 months**

12. Were you serving a probationary or trial period at the time of the action being appealed?

☐ Yes    ☒ No

---

**MERIT SYSTEMS PROTECTION BOARD FORM  
185-1**

**APPEAL FORM - APPELLANT AND AGENCY  
INFORMATION**

**HEARING:** If the Board determines that it has jurisdiction over the matter, you are appealing, you may have a right to a hearing before an administrative judge. If you choose to have a hearing, the Board will notify you when and where it is to be held. If you do not want a hearing, the Board will make its decision on the basis of the submissions of the parties.

13. Do you want a hearing?

☐ Yes    ☒ NO

14. I certify that all of the statements made in this form and all attached forms are true, complete, and correct to the best of my knowledge and belief.

**Appellant's signature:**

/s/ Evelyn Johnson

**Date:**                      **September 6, 2003**

Please check the appropriate box below for EACH FORM that you have attached to this form to complete your appeal.

## APPENDIX — 17-A

Please staple all attached forms to this form in the upper left hand corner.

- ☐ **MSPB Form 185-2, Appeal of Agency Personnel Action or Decision (non-retirement)**
- ☐ **MSPB Form 185-3, Appeal of OPM or Agency Retirement Decision or Action**
- ☐ **MSPB Form 185-4A, Claims of Mistakes in Procedures Or Violations of Law**
- ☐ **MSPB Form 185-4B, Claims of Prohibited Personnel Practices**
- ☐ **MSPB Form 185-4C, Claims of Prohibited Personnel Practices**
- ☐ **MSPB Form 185-5, Whistleblower Claims or Individual Right of Action (IRA) Appeal**
- ☐ **MSPB Form 185-6, Whistleblower Stay Request**
- ☐ **MSPB Form 185-7, USERRA Claims or USERRA Appeal**
- ☐ **MSPB Form 185-8, Veterans' Preference Claims or VEOA Appeal**
- ☐ **MSPB Form 185-9, Designation of Representative Form**

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**MERIT SYSTEMS PROTECTION BOARD FORM  
185-2**

**APPEAL OF AGENCY PERSONNEL ACTION OR  
DECISION (Non-retirement)**

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Complete this form and attach it to MSPB Form 185-1 if you are appealing an agency personnel action or decision (other than a decision or action affecting your retirement rights or benefits) that is appealable to the Board under a law, rule, or regulation. See 5 CFR 1201.3(a) for a list of appealable personnel actions and decisions. If the personnel action or decision is appealable to the Board, you should have received a final decision letter from the agency that informs you of your right to file an appeal with the Board.

**Please submit only the attachments requested in this form at this time.** You will be afforded the opportunity to submit detailed evidence in support of your appeal later in the proceeding.

Name (Last, first, middle initial)

**Johnson, Evelyn L.**

1. Check the box that best describes the **personnel action or decision** taken by the agency you named in MSPB Form 185-1 that you wish to appeal. (If you are appealing more than one action or decision, check each box that applies.) Attach a copy of the proposal letter and decision letter (if any). If an SF-50 or its equivalent was issued and is available, attach it now; however, **DO NOT** delay filing your appeal because you do not have an SF-50. You may submit the SF-50 when it becomes available.

- ☒ Removal (Retaliatory)
- ☐ Reduction in grade or pay
- ☐ Suspension for more than 14 days
- ☐ Separation or demotion by reduction in force (RIF)
- ☐ Furlough of 30 days or less
- ☐ Termination during probationary period
- ☐ Denial of within-grade increase
- ☐ Failure to restore/re-employ/reinstate or improper restoration/re-employment /reinstatement

## APPENDIX — 17-A

- ☐ Negative suitability determination
- ☒ Other action, describe: **Continuing retaliatory actions, hostile work environment, and reprisal due to the filing of the EDR/EEO complaint of intentional discrimination and disparate treatment due to non promotion under Title VII, prohibited actions based on race, national origin, age, sex, color, and religion.**

---

2. Date you received the agency's proposal letter (if any) (month, day, year) (Attach a copy):

**June 20, 2003. (Tab F)**

---

3. Date you received the agency's final decision letter (if any) (Month, day, year) Attach a copy:

**June 20, 2003 (Tab F)**

---

4. Effective date (if any) of the agency action or decision (month, day, year):

---

5. Prior to filing this appeal, did you and the agency mutually agree in writing to try to resolve the matter through an alternative dispute resolution (ADR) process?

☐ Yes (Attach a copy of the agreement) ☒ No

---

6. Explain briefly why you think the agency was wrong in taking this action.

**Agency's action was retaliatory/reprisal as a result of my filing the EDR/EEO complaint on March 12, 2002. Complaint allegations were continuing intentional discrimination and disparate treatment on non promotion, filed under Title VII due to prohibited discriminatory actions based on race, national origin, sex, age, color, and religion, and other federally protected rights.**



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7. What action would you like the Board to take in this case (i.e., what remedy are you asking for)?

**Independent agency full investigation of all allegations related to the entire complaint and consolidate original/initial complaint filed on March 12, 2002, including all retaliatory actions of harassment and hostile work environment, through the most recent adverse employment action of termination. Remedy all damages incurred, (as asked on the attachment), as provided by law.**

☐ With respect to the agency personnel action or decision you are appealing, have you, or has anyone on your behalf, filed a grievance under a negotiated grievance procedure provided by a collective bargaining agreement?

☐ Yes (Attach a copy)

☐ No✓

---

9. If your answer to question 8 is "Yes," on what date was the grievance filed (month, day, year)?

**Appeal on adverse action of termination pending, hearing scheduled on September 25, 2003. Continuing retaliatory actions, hostile work environment, and reprisal pending. Initial EDR complaint filed on March 12, 2002, final decision entered on April 24, 2003.**

**Enter the place where the grievance was filed if different from your answer to question 5 on MSPB Form 185-1:**

Agency Name:

Bureau:

Address:

Address:

City, State, Zip Code:

---

10. If your answer to question 8 was "Yes," has a decision on the grievance been issued?



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☐ Yes (Attach a copy)

☐ No

If "Yes," on what date was the decision issued (month, day, year)? **April 24, 2003**

---

**MERIT SYSTEMS PROTECTION BOARD FORM  
185-3  
APPEAL OF OPM OR AGENCY RETIREMENT  
DECISION OR ACTION**

Complete this form and attach it to MSPB Form 185-1 if you are appealing an administrative decision or action by the office of Personnel Management (OP) or a Federal agency affecting your rights or benefits under the Civil Service Retirement System (CSRS) or the Federal Employees Retirement System. See 5 CFR 1201.3(a)(6). If the decision or action is appealable to the Board, you should have received a final decision from OPM or agency that informs you of your right to file an appeal with the Board.

---

**Name** (Last, first, middle initial)

**Johnson, Evelyn L.**

---

**1. In which retirement system are you enrolled?**

☐ CSRS

☐ CSRS offset

☐ FERS✓

☐ Other, describe:

**(FERCCA - OPM's final**

**determination still pending)**

---

**2. Are you a:**

☐ Current Employee

☐ Annuitant

☐ Surviving Spouse

☒ Other, describe:

**Involuntarily/retaliatorily Terminated on June 20, 2003 (see attached letter and note to file), then placed on Leave-without-pay status effective July 2, 2003. (Tabs D, E, and F)**

---

**3. If retired, date of retirement (month, day, year):** **No**

## APPENDIX — 17-A

4. Are you appealing an action or decision concerning a retirement coverage error under the provisions of the Federal Erroneous Retirement Coverage Corrections Act (FERCCA)?

Possibly, depending on the OPM's determination

☐ Yes      ☐ No

You may raise certain other claims in connection with an appeal of an agency personnel action or decision. Such claims must be raised no later than the close of the pre-hearing conference on your appeal. See 5 CFR 1201.24(b). If you wish to raise any of these claims at this time, complete and attach the appropriate form as described below. Please review the instructions for these forms - and the laws and regulations cited below - carefully. Remember that you are responsible for proving each claim you raise.

**MSPB Form 185-4A** - For claims that the agency made mistakes in applying required procedures (harmful error) or that the agency violated a law in taking the action or making the decision. See 5 CFR 1201.56(b)(3), and (c)(3). **DO NOT** use this form for claims of a violation of law for which another form is provided; instead, use the appropriate form described below.

**MSPB Form 185-4B** - For claims that the agency action or decision was the result of prohibited discrimination (race, color, religion, sex, national origin, disability, age). See 5 CFR 1201.151 and 1201.153.

**MSPB Form 185-4C** - For claims that the agency action or decision was the result of a prohibited personnel practice. See 5 U.S.C. 2302(b) and 5 CFR 1201.56(b)(2). **DO NOT** use this form for whistleblower or veteran's preference claims; instead, use the appropriate form described below.

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**MSPB Form 185-5** - For claims that the agency action or decision was based on whistleblowing. See 5 U.S.C. 2302(B)(8), 5 CFR 1209.2(b)(2), and 5 CFR 1209.6(a). (You may also request that the Board stay the action or decision by completing and attaching **MSPB Form 185-6**. See 5 CFR 1209.8 and 1209.9.)

**MSPB Form 185-7** - For claims that the agency violated your rights under USERRA (other than rights related to the Thrift Savings Plan for Federal employees) in taking the action or making the decision. See 38 U.S.C. 4324, 5 CFR 1208.11, and 5 CFR 1208.13.

**MSPB Form 185-8** - For claims that the agency violated a law or regulation relating to veterans' preference in taking the action or making the decision. **IMPORTANT:** If you choose to make your veterans' preference claim in connection with this appeal of an agency action or decision, you may NOT also file a VEOA complaint with the Secretary of Labor. See 5 U.S.C. 3330a(e) and 5 CFR 1208.26.

5. Describe the retirement decision or action you are appealing.

**Involuntary separation due to involuntary relinquishing of duties and responsibilities without cause, termination of 21 years of federal government employment affecting full employment benefits upon retirement. Would like to take Involuntary Separation under OPM's Discontinued Service Retirement (DSR). Retirement coverage under Federal Employees Retirement System (FERS) with 21+ years of federal service, 52 year old, and involuntary separation/retirement would be contingent upon promotion to a higher grade due to past intentional non-promotion and other unlawful personnel adverse actions.**

---

Answer either Question 6 or Question 7, whichever applies

## APPENDIX — 17-A

to your appeal. **Please submit only the attachment requested in Question 6 or Question 7 at this time.** You will be afforded the opportunity to submit detailed evidence in support of your appeal later in the proceeding

---

6. If you are appealing an OPM retirement decision, have you received a final or reconsideration decision from OPM?

☐ Yes (Attach a copy)

☐ No

If "Yes," on what date did you receive the OPM final or reconsideration decision (month, day, year)?

---

7. If you are appealing a retirement decision or action by a Federal agency other than OPM, have you received a final decision from that agency?

☒ Yes (Attach a copy)

☐ No

If "Yes," on what date did you receive the agency decision (month, day, year)?

**April 29, 2003 - (Tabs F, G)**

---

8. Why do you think the decision of action was wrong?

**Agency decision was not based on merits, appearance of bias, and overwhelming conflict of interest. Harmful error in application of law.**

---

9. What action would like the Board to take in this case (i.e., what remedy are you asking for)?

**Independent agency full investigation of all allegations related to the entire complaint and consolidate original/initial complaint filed on March 12, 2002, including all retaliatory actions of harassment and hostile work environment, through the most recent adverse employment action of termination, dated June 20, 2003, still pending for a**

## APPENDIX — 17-A

hearing with a magistrate court judge, scheduled on September 25, 2003. Remedy all damages incurred (as asked on the attachment), as provided by law. (Tab C)

You may raise certain other claims in connection with an appeal of a retirement decision or action. Such claims must be raised no later than the close of the pre-hearing conference on your appeal. See 5 CFR 1201.24(b). If you wish to raise any of these claims at this time, complete and attach the appropriate form as described below. Please review the instructions for these forms - and the laws and regulations cited below - carefully. Remember that you are responsible for proving each claim you raise.

**MSPB Form 185-4A** - For claims that the agency made mistakes in applying required procedures (harmful error) or that the agency violated a law in taking the action or making the decision. See 5 CFR 1201.56(b)(1), (b)(3), and (c)(3). **DO NOT** use this form for claims of a violation of law for which another form is provided; instead, use the appropriate form described below.

**NOTE:** The kinds of claims that may be raised in the following forms are **RARELY** applicable to retirement appeals.

**MSPB Form 185-4B** - For claims that the agency action or decision was the result of prohibited discrimination (race, color, religion, sex, national origin, disability, age). See 5 CFR 1201.151 and 1201.153.

**MSPB Form 185-4C** - For claims that the agency action or decision was the result of a prohibited personnel practice. See 5 U.S.C. 2302(b) and 5 CFR 1201.56(b)(2). **DO NOT** use this form for whistleblower or veteran's preference claims; instead, use the appropriate form described below.

**MSPB Form 185-5** - For claims that the agency action or decision was based on whistleblowing. See 5 U.S.C.



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**2302(b)(8), 5 CFR 1209.2(b)(2), and 5 CFR 1209.6(a).**  
(You may also request that the Board stay the action or decision by completing and attaching **MSPB Form 185-6.**  
**See 5 CFR 1209.8 and 1209.9.)**

**MSPB Form 185-7** - For claims that the agency violated your rights under USERRA (other than rights related to the Thrift Savings Plan for Federal employees) in taking the action or making the decision. **See 38 U.S.C. 4324, 5 CFR 1208.11, and 5 CFR 1208.13.**

**MSPB Form 185-8** - For claims that the agency violated a law or regulation relating to veterans' preference in taking the action or making the decision. **IMPORTANT:** If you choose to make your veterans' preference claim in connection with this appeal of an agency action or decision, you may NOT also file a VEOA complaint with the Secretary of Labor. **See 5 U.S.C. 3330a(e) and 5 CFR 1208.26.**

---

### MERIT SYSTEMS PROTECTION BOARD FORM 185-4A

#### CLAIMS OF MISTAKES IN PROCEDURES OR VIOLATIONS OF LAW

Complete this form and attach it to MSPB Form 185-1 if you are raising a claim - in connection with an appeal of an agency action or decision for which you have completed MSPB Form 185-2 or MSPB 185-3 - that the agency made mistakes in applying required procedures (harmful error) or that the agency violated a law in taking the action or making the decision that you are appealing.

DO NOT use this form for claims of a violation of law for which another form is provided; instead, use the appropriate form for that claim (i.e., MSPB Form 185-4B for

## APPENDIX — 17-A

a discrimination claim, MSPB Form 185-4C for prohibited personnel practices claims, MSPB Form 185-5 for a whistleblower claim, MSPB Form 185-7 for a USERRA claim, or MSPB Form 185-8 for a veterans' preference claim).

---

**Name** (last, first, middle initial)

**Johnson, Evelyn L.**

---

**Mistakes in Procedures (Harmful Error)**- Harmful error is defined in the Board's regulations as: "Error by the agency in the application of its procedures that is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence of the error." See 5 CFR 1201.56 (c)(3).

1. If you believe that the agency made a mistake (or mistakes) in applying required procedures in connection with the action or decision you described in MSPB Form 185-2 or MSPB Form 185-3, identify the procedure(s) and describe the mistake(s).

Employer dismissed the entire complaint without considering the merits and many factual issues and disputes regarding personnel actions; discounted substantial material evidence presented at the hearing; respondent offered no affirmative defense; appearance of bias; and overwhelming conflict of interest. Alleged unlawful personnel violations include (for specific allegations, please see the attachment):

a. Unit official's abuse of authority through manipulation of personnel actions and promoting favored employees on many instances;

b. Promotions of favored employees and disparate treatment not in accordance with the regulations under the Judiciary Regulations on Personnel Administration;



## **APPENDIX — 17-A**

**c. Disparate treatment in application of leave usage and violation of FMLA rights;**

**d. Involuntary discharge without cause;**

**e. Retaliation and wrongful termination due to the filing of Title VII complaint.**

---

**2. Explain how you were harmed by the mistake(s) in procedure(s) described in your answer to question 1.**

**a. Irreparable injury. Injury due to a continuing and intentional discrimination; retaliation and harassment, creating a hostile work environment; continuing harassment and retaliatory actions;**

**b. Economic injury. Violation of Equal Pay Act of the Fair Labor Standards, 29 U.S.C. § 216. Recovery of back pay wages due to willful intentional discrimination;**

**c. Involuntary separation. Termination of 21+ years of federal government employment and long-term economic effect on full retirement and annuity upon retirement; no position available (former position was given to two other employees, one employee hired at four grades higher than petitioner, one employee was promoted to equate one grade lower than the petitioner), antagonistic and hostile working environment, and employer historically resisted the anti discrimination statute;**

**d. Mental anguish and emotional abuse and suffering. Manifested in emotional stress, depression, digestive problems, narcolepsy (sleep disorder), high blood pressure, deep grief, distress, and anxiety;**

**e. Drug dependency. Long-term effect of taking stimulant to control narcolepsy. Drugs stimulate the**

## **APPENDIX — 17-A**

**central nervous system and are used medicinally to combat depression and narcolepsy. Prolonged uses are followed by fatigue and depression;**

**f. Double [treble] damages. Intended in certain instances, as a kind of punishment for improper behavior;**

**g. Exemplary [punitive] damages. Punishment to the wrongdoer and excess enhancement to the injured due to intentional, malicious, and willful misconduct.**

---

**Violations of Law - An appealable action will be reversed as being "not in accordance with law" if the agency's action is unlawful in its entirety, i.e., if there is no legal authority for the action.**

**3. If you believe that the agency violated a law in connection with the action or decision you described in MSPB Form 185-2 or MSPB 185-3, identify the law.**

**a. Civil Rights Act of 1991, codified at 42 U.S.C. § 1981a(b)**

**b. Civil Rights Act of 1964; 42 U.S.C. § 2000e-5(K); 5 U.S.C. § 5596**

**c. Equal Pay Act of the Fair Labor Standards Act, 29 U.S.C. § 216; 5 CFR 550-804(a); 550 - 805**

**d. Competitive Service and competition status. 5 CFR 212-101(a)(2). "All positions in the legislative and judicial branches of the federal government and in the District of Columbia specifically made subject to the civil service laws by statute." 5 U.S.C. § 2102**

**e. Individual right of action in certain reprisal cases. 5 U.S.C. § 1221**

## APPENDIX — 17-A

**f. Federal employee benefits affecting the Federal Employees' Retirement System (FERS) and component Social Security Benefits. 5 CFR 1201.3(a)(6); 5 U.S.C. § 84**

**g. Federal employee benefits affecting the Thrift Savings Plan (TSP). 5 CFR 1609.1(b)(1)(I); 1613.202-03; 1613.261**

---

**4. Describe how the law you identified in your answer to question 3 was violated.**

**a. Employer intentionally engaged in unlawful harassment and intentional discrimination;**

**b. Employer intentionally engaged in unlawful employment practice;**

**c. Employer abuse of authority affecting terms, conditions, and privileges of employment;**

**d. Employer engaged in wide range of unlawful personnel actions;**

**e. Employer engaged in continuing intentional discriminatory actions and disparate treatment for many years;**

**f. Employer engaged in continuing retaliatory actions creating harassment, intimidation, offensive, and hostile work environment while employee engaged in federally protected activity;**

**g. Employer engaged in the computer monitoring while singling-out the employee, and violated Fourth Amendment, which protects "people" rather than "places;" "protection of general rights to privacy - right to be let alone by other people, and wherever an individual may harbor a reasonable 'expectation of privacy,' entitled to be free from**

## APPENDIX — 17-A

unreasonable government intrusion.”

h. Involuntary discharge with cause;

i. Retaliation and wrongful termination of more than 21 years of federal government service due to the filing of Title VII complaint.

.....

### MERIT SYSTEMS PROTECTION BOARD FORM 185-4B

#### CLAIMS OF PROHIBITED DISCRIMINATION

Complete this form and attach it to MSPB Form 185-1 if you are raising a claim - in connection with an appeal of an agency action or decision for which you have completed MSPB Form 185-2 or MSPB Form 185-3 - that the agency action or decision was the result of prohibited discrimination.

If you have previously filed a discrimination complaint with the agency under the procedures of the Equal Employment Opportunity Commission (29 CFR Part 1614), you may file an appeal with the Board with the Board after you have received the agency's final decision on your complaint or, if the agency has not issued a final decision on your discrimination complaint within 120 calendar days after the date you filed it, at any time after the end of the 120-day period. See 5CFR1201.154.

Name (last, first, middle initial)

Johnson, Evelyn L.

**Discrimination** - An allegation of discrimination is not an independent source of Board jurisdiction. See 5 CFR 1201.151.

1. Check the appropriate box (or boxes below to indicate the basis (or bases) of your claim that you were discriminated

## APPENDIX — 17-A

against by the agency in connection with the action or decision you described in MSPB Form 185-2 or MSPB Form 185-3:

- ☒ Race      ☒ Color      ☐ Religion  
☒ Sex      ☒ National origin  
☐ Disability      ☒ Age

---

2. Have you filed a formal discrimination complaint with your agency concerning the action you are appealing?

- ☐ Yes (Attach a copy)      ☐ No

(Tabs G through S)

---

3. If your answer to question 2 is "Yes," enter the place where the complaint was filed **if different from your answer to question 5 on MSPB Form 185-1:**

Agency Name:

Bureaus:

Address:

Address:

City, State, Zip code:

---

4. Date filed (month, day, year): March 12, 2002

---

5. Has a decision been Issued?

- ☐ Yes (Attach a copy)      ☐ No

---

6. Are you requesting an award of compensatory damages in connection with your discrimination claim? **See 5 CFR 1201.202(c).**

- ☐ Yes ☒      ☐ No

If "Yes," in what amount? \$

**Subject to appropriation, back pay, front pay, attorneys' fees, ad associated benefits pursuant to 5 U.S.C. § 5596; full relief under Title VII in accordance with the standards prescribed under § 706(k) of the Civil Rights Act of 1964 (42 U.S.C. § 200e-5(k)); 5 U.S.C. § 841.507. (Tab C)**

## **APPENDIX — 17-A**

7. If your answer to question 6 is "Yes," explain why you feel that you are entitled to an award of compensatory damages under the applicable statutory standard. See 42 U.S.C. 1981a and 5CFR 1201.202©).

a. Employer intentionally engaged in unlawful harassment and intentional discrimination and disparate treatment, violating anti discrimination law under Title VII;

b. Employer intentionally engaged in an unlawful employment practice and abuse of authority, affecting terms, conditions, and privileges of employment;

c. Employer engaged in wide range of unlawful personnel actions.

d. Employer engaged in continuing intentional discriminatory actions and disparate treatment for many years.

e. Employer engaged in continuing retaliatory actions creating harassment, intimidation, offensive, and hostile work environment while employee engaged in federally protected activity;

f. Employer engaged in the computer monitoring while singling-out the employee, and violated Fourth Amendment which protects 'people' rather than 'places;' protection of general rights to privacy - right to be let alone by other people, and wherever an individual may harbor a reasonable 'expectation of privacy,' entitled to be free from unreasonable government intrusion."

g. Involuntary discharge without cause;

h. Retaliation and wrongful termination or



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more than 21 years of federal government service due to the filing of Title VII complaint.

---

**MERIT SYSTEMS PROTECTION BOARD FORM  
185-4C**

**CLAIMS OF PROHIBITED PERSONNEL  
PRACTICES**

Complete this form and attach it to MSPB Form 185-1 if you are raising a claim - in connection with an appeal of an agency action or decision for which you have completed MSPB 185-2 or MSPB 185-3 - that the agency action or decision was the result of one or more of the statutory prohibited personnel practices. See 5 U.S.C. 2302(b).

**DO NOT** use this form for any of the following prohibited personnel practice claims:

- A claim that the action or decision was the result of discrimination based on race, color, religion, sex, national origin, disability, or age, 5 U.S.C. 2302(b)(1); complete MSPB Form 185-4B instead.
- A claim that the action or decision was based on whistleblowing, 5 U.S.C. 2302(b)(8); complete MSPB 185-5 instead.
- A claim that the action or decision violated a veterans' preference requirement, 5 U.S.C. 2302(B)(11); complete MSPB Form 185-8 instead.

---

Name (Last, first, middle initial)

**Johnson, Evelyn L.**

---

**Prohibited Personnel Practices** - The statutory prohibited personnel practices are set forth at 5 U.S.C.



## APPENDIX — 17-A

**2302(b)(1)-(b)(12).** An allegation of a prohibited personnel practice is not an independent source of Board jurisdiction. The underlying action must first be within the Board's jurisdiction before an allegation of a prohibited personnel practice may be considered by the Board. See 5 CFR 1201.56(b)(2).

The Prohibited Personnel Practices statute, 5 U.S.C. 2302, does **not** apply to all personnel actions or to all Federal employees. Please review the definitions of "personnel action," "covered position," and "agency" at 5 U.S.C. 2302(a) to be sure that both you and the action or decision you are appealing are covered by those definitions before you complete and submit this form.

1. Check the appropriate box (or boxes) below to indicate the basis (or bases) of your claim that the agency committed a prohibited personnel practice **in connection with the action or decision you described in MSPB Form 185-2 or MSPB Form 185-3.**

☐ Discrimination based on marital status or political affiliation

☐ Soliciting or considering employment recommendations not based on the individual's work performance, ability, aptitude, general qualifications, suitability, character, or loyalty

☐ Coercing the political activity of any person

☐ Deceiving or willfully obstructing a person's right to compete for employment

☐ Influencing any person to withdraw from competition for any position, whether to help or hurt anyone else's employment prospects

☐ Giving unauthorized preferential treatment to any

## APPENDIX — 17-A

employee or applicant

☐ Nepotism

☐ Taking or failing to take a personnel action as a reprisal for the exercise of any appeal, complaint, or grievance right; for assisting anyone else in exercising such a right; for cooperating with or disclosing information to the Special Counsel of the Inspector General of an agency; or for refusing to obey an order that would require the individual to violate a law

☐ Discriminating on the basis of personal conduct which does not adversely affect the performance of the employee or applicant or the performance of others, except in case of criminal conviction for the conduct

☐ Taking or failing to take any other personnel action that would violate any law, rule, or regulation implementing or directly concerning the merit system principles

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### MERIT SYSTEMS PROTECTION BOARD FORM 185-5

#### WHISTLEBLOWER CLAIMS OR INDIVIDUAL RIGHT OF ACTION (IRA) APPEAL

Complete this form and attach it to MSPB Form in either of the following situations:

- You are raising a claim- in connection with an appeal of an agency action or decision for which you have completed MSPB Form 185-2 or MSPB Form 185-3 - that the agency action or decision was based on whistleblowing. See 5 U.S.C. 2302(b)(8) and 5 CFR 1209.2(b)(2).

## APPENDIX — 17-A

- You are filing an individual Right of Action (IRA) appeal authorized by the Whistleblower Protection Act (WPA) after first filing a complaint with the Office of Special Counsel (OSC) and exhausting the procedures of that office. See 5 U.S.C. 1214(a)(3), 1221, and 2302(b)(8), and 5 CFR 1209.2(b)(1).

Threatening, proposing, taking, or not taking a personnel action based on whistleblowing is one of the twelve statutory prohibited personnel practices set forth at 5 USC 2302(b). The Prohibited Personnel Practices statute 5 U.S.C. 2302, does **NOT** apply to all personnel actions or to all Federal employees. Please review the definitions of "personnel action," "covered position," and "agency" at 5 U.S.C. 2302(a) to be sure that both you and the action or decision that you claim was based on whistleblowing are covered by those definitions before you complete and submit this form.

If this is an IRA appeal, your appeal will consist **ONLY** of a completed MSPB Form 185-1 and MSPB Form 185-5. (You may also attach MSPB Form 185-6 if you are requesting a stay and/or MSPB Form 185-9 if you are designating a representative.) In an IRA appeal, the Board may consider **ONLY** the claim that the agency action or decision was based on whistleblowing. It may not consider the merits of the agency action or decision, nor may it consider any claims other than the claim that the action or decision was based on whistleblowing.

If you are requesting that the Board stay the personnel action or decision, also complete and attach MSPB Form 185-6. See CFR 1209.8 and 1209.9.

**Please submit only the attachments requested in this form at this time.** You will be afforded the opportunity to submit detailed evidence in support of your appeal later in proceeding.

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If you filed a complaint with the Office of Special Counsel (OSC) using Form OSC-11 (8/00) before filing this appeal, you may attach a copy of Part 2, Reprisal for Whistleblowing, of the OSC form together with any continuation sheet or supplement filed with OSC. This will give the Board the information requested in questions 1 through 4. Please complete the remainder of this form even if you attach Form OSC-11.

---

Name (Last, first, middle initial)

**Johnson, Evelyn L.**

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**THE WHISTLEBLOWING DISCLOSURE(S)** Answer questions 1 and 2 regardless of whether this is an IRA appeal or a claim that an appealable agency action or decision was based on whistleblowing. A whistleblowing disclosure is a disclosure of information that you reasonably believe evidences a violation of any law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety. See 5 U.S.C. 230(b)(8).

1. For each disclosure you made, provide the date of the disclosure (month, day, year) and summarize the disclosure below (attach additional sheets if necessary) or, if the disclosure was made in writing, attach a copy.

**Please see attachment. (Tabs D, E, F, T, and U)**

---

2. Provide the name, title, and office address of the person to whom each disclosure described in you answer to question 1 was made. (Attach additional sheets if necessary.)

Name: **Norman E. Zoller**

Title: **Circuit Executive**

Office: **Office of the Circuit Executive**

**United States Court of Appeals for the  
Eleventh Circuit**

Address: **56 Forsyth Street, NW**

## APPENDIX — 17-A

City, State, Zip Code: Atlanta, Georgia 30303-2289

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**THE AGENCY PERSONNEL ACTION OR DECISION -**  
Answer question 3 regardless of whether this is an IRA appeal or a claim that an appealable agency action or decision was based on whistleblowing. Answer questions 4 and 5 ONLY if this is an IRA appeal.

3. Provide a chronology of facts concerning the agency action or decision that you claim was based on whistleblowing and explain why you believe that it was based on whistleblowing.

Substantial material evidence presented to the court at the evidentiary hearing were all dismissed, without considering the merits and many issues of factual disputes and questions of law. Information was disclosed to the Circuit Executive, the supervising official of the court-unit head and primary respondent before filing the EDR/EEO employment complaint. The Circuit Executive is the chief administrative official responsible for the administrative operations of the Eleventh Circuit US Court of Appeals. Appellant reasonably believes information disclosed evidences violation of law, violation judiciary personnel rules and regulations, and evidence showed clear and convincing abuse of authority.

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4. Identify the agency action or decision that you claim was based on whistleblowing (see 5 U.S.C. 2302(a) for covered personnel actions) and provide the date (month, day, year) of the action or decision. (Attach any proposal letter, decision letter, and/or SF-50 that you received in connection with this action or decision.)

Employer issued a termination letter dated June 20, 2003 but tried to retract the unlawful adverse action by issuing letters dated July 1 and 10, 2003, and placing appellant on Leave-Without-Pay status.



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Check the appropriate box below to indicate whether the action or decision was:

☐ Threatened

☐ Proposed

☐ Taken✓

☐ Not taken    Tabs D, E, and  
F)

5. What action would you like the Board to take in this case (i.e., what remedy are you asking for)?

**Independent agency full investigation of all allegations related to the entire complaint and consolidate original/initial complaint filed on March 12, 2002, including all retaliatory actions of harassment and hostile work environment, through the most recent adverse employment action of termination, dated June 20, 2003, still pending for a hearing with a magistrate court judge, scheduled on September 25, 2003. Remedy all damages incurred (as asked on the attachment), as provided by law. (Tab C)**

### **FILING WITH OFFICE OF SPECIAL COUNSEL (OSC)**

**- Answer questions 6 through 8 ONLY if you previously sought corrective action from the Office of Special Counsel (OSC) concerning the same disclosure(s) and the same agency personnel action or decision that you must describe in your answers to questions 1 through 4. If this is an IRA appeal, you MUST exhaust OSC procedures before you may file an appeal with the Board.**

6. Attach a copy of your request to the Office of Special Counsel for corrective action and provide the date (month, day, year) that you filed it.

7. Provide the location of the OSC office where you filed your request.

Office Name:

Address:

## APPENDIX — 17-A

Address:

City, State, Zip code:

---

8. Have you received written notice of your right to file this appeal from the Office of Special Counsel?

☐ Yes (Attach a copy)

☐ No

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**REQUEST FOR CONSEQUENTIAL DAMAGES -**  
**Answer questions 9 and 10.**

9. Are you requesting an award of consequential damages in connection with your whistleblower claim? See 5 CFR 1201.202(b).

☒ Yes✓

☐ No

If Yes, in what amount?

**Subject to appropriation, back pay, front pay, attorneys' fees, and associated benefits pursuant to 5 U.S.C. § 5596; FULL RELIEF UNDER Title VII in accordance with the standards prescribed under § 706(k) of the Civil Rights Act of 1964 (42 U.S.C. § 200E-5(K); 5 U.S.C. § 841.507. (Tab C)**

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10. If your answer to question 9 is "Yes," explain why you feel that you are entitled to an award of consequential damages under the applicable statutory standard. See 5 U.S.C. 1221(g)(1)(A)(ii) and 5 CFR 1201.202(b).

**a. Irreparable injury. Injury due to a continuing and intentional discrimination; retaliation and harassment, creating a hostile work environment; continuing harassment and retaliatory actions;**

**b. Economic injury. Violation of Equal Pay Act of the Fair Labor Standards, 19 U.S.C. § 216. Recovery of back pay wages due to willful intentional discrimination;**



## APPENDIX — 17-A

c. Involuntary separation. Termination of 21+ years of federal government employment and long-term economic effect on full retirement and annuity upon retirement; no position available (former position was given to two other employees, one employee hired at four grades higher than petitioner, one employee was promoted to equate one grade lower than the petitioner), antagonistic and hostile working environment, and employer historically resisted the anti discrimination statute;

d. Mental anguish and emotional abuse and suffering. Manifested in emotional stress, depression, digestive problems, narcolepsy (sleep disorder), high blood pressure, deep grief, distress, and anxiety;

e. Drug dependency. Long-term effect of taking stimulant to control narcolepsy. Drugs stimulate the central nervous system and are used medicinally to combat depression and narcolepsy. Prolonged uses are followed by fatigue and depression;

f. Double [trebel] damages. Intended in certain instances, as a kind of punishment for improper behavior;

g. Exemplary [punitive] damages. Punishment to the wrongdoer and excess enhancement to the injured due to intentional, malicious, and willful misconduct.

---

**STAY REQUEST** - If you are requesting that the Board STAY the agency action or decision that is the subject of your whistleblower appeal, complete and attach MSPB Form 185-6. If you have ALREADY requested a stay from the Board in connection with this agency action or decision, answer questions 11 through 13.

11. Attach a copy of your stay request and provide the date

APPENDIX — 17-A

(month, day, year) that you filed it.

12. Provide the location of the MSPB office where you filed your request.

Office Name:

Address:

Address:

City, State, Zip code:

13. Has there been a decision on your stay request?

☐ yes (attach a copy)

☐ No

DESIGNATION: The individual or organization named below is hereby designated to represent:

**NAME AND ADDRESS OF APPELLANT:**

**Evelyn L. Johnson  
6241 S. Skyline Drive  
Douglasville, GA 30135**

"I hereby designate **The Law Office of Melville Johnson, P.C.** to serve as my representative during the course of this appeal. I understand that my representative is authorized to act on my behalf. In addition, I specifically delegate to my representative the authority to settle this appeal on my behalf. I understand that any limitation on this settlement authority must be filed in writing with the Board.

Representative's address (number and street, city, state and Zip code).

**Dawn M. Rivera, Esq.  
Melville Johnson, P.C.  
44 Broad Street, NW  
Atlanta, Georgia 30303**

Representative's telephone numbers (include area code) and e-mail address:

**APPENDIX — 17-A**

Office: (404) 524-9111

FAX: (404) 524-6611

Other:

E-mail address: <[drivera@melvillejohnson.com](mailto:drivera@melvillejohnson.com)>

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Appellant's Signature:

/s/ Evelyn Johnson

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Representative's Signature:

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Date: September 6, 2003

APPENDIX — 18-A

MELVILLE JOHNSON, P.C.  
44 Broad Street, N.W.  
Suite 222, The Grant Building  
Telephone (404) 524-9111  
Fax (404) 524-6611  
email [info@melvillejohnson.com](mailto:info@melvillejohnson.com)  
[www.melvillejohnson.com](http://www.melvillejohnson.com)

December 12, 2003

**VIA FIRST CLASS MAIL**

Ms. Gerrilyn G. Brill  
U.S. Magistrate Judge  
United States District Court  
Northern District of Georgia  
1690 U.S. Courthouse Building  
75 Spring Street, S.W.  
Atlanta, Georgia 30303-3361

Re: Evelyn Johnson v. Staff Attorneys' Office, U.S. Court  
of Appeals for the Eleventh Circuit

Dear Judge Brill:

Enclosed please find *Complainant's Objection to  
Hearing Held Without Notice*. Thank you very much for your  
attention to this matter. If you have any questions, please do  
not hesitate to call.

Very truly yours,  
MELVILLE JOHNSON, P.C.  
/s/ Dawn M. Rivera  
Dawn M. Rivera  
Attorney at Law

DMR:me  
Enclosure

## APPENDIX — 18-A

IN THE UNITED STATES COURT OF APPEALS FOR  
THE ELEVENTH CIRCUIT

EVELYN JOHNSON, )  
 )  
 Complainant, )  
 )  
 )  
 v. )  
 )EMPLOYMENT DISPUTE  
 )RESOLUTION HEARING  
 )  
 STAFF ATTORNEYS' )  
 OFFICE, U.S. COURT )  
 OF APPEALS FOR )  
 THE ELEVENTH CIRCUIT )  
 )  
 Respondent Agency. )  
 )

### OBJECTION TO HEARING

**HELD WITHOUT NOTICE**

COMES NOW Complainant, Evelyn L. Johnson, by and through counsel, Melville Johnson, P.C., and hereby objects to the hearing held without proper notice on Monday, December 8, 2003.

On Thursday, December 4, 2003, counsel for Ms. Johnson received a telephone call from the opposing counsel, stating that Judge Brill wished to hold a telephone

## APPENDIX — 18-A

conference regarding whether any issues remained unresolved in this matter. Counsel for Ms. Johnson advised SAO counsel that Ms. Johnson had been unavailable since the Thanksgiving holiday and was assured that it would be unnecessary for Ms. Johnson to participate in the conference. **[Pet.'s Note: SAO's counsel and Respondent made the decision that it would be unnecessary for Petitioner to participate at the supposedly "telephone conference."].**

On that basis, counsel for Ms. Johnson agreed to a telephone conference with opposing counsel and with Judge Brill, to be held on December 8, 2003. On Friday, December 5, 2003, SAO counsel contacted counsel for Ms. Johnson to advise that Judge Brill wished to hold the "conference" in chambers, instead of via telephone. Counsel for Ms. Johnson agreed to proceed on that basis. However, upon arriving in chambers, counsel for Ms. Johnson discovered that Judge Brill had convened a hearing, with a court reporter and a witness produced by SAO.

Pursuant to the Due Process Clause of the United

APPENDIX — 18-A

States Constitution, Ms. Johnson has the right to receive proper notice of any hearing held regarding her prohibited personnel action claims. Such notice was not provided to Ms. Johnson personally or through her counsel prior to the hearing held on December 8, 2003.

MELVILLE JOHNSON, P.C.

/s/ Dawn M. Rivera  
Dawn M. Rivera  
Georgia Bar No. 002535

44 Broad Street, N.W.  
Suite 222, The Grant Building  
Atlanta, Georgia 30303  
404-524-9111 - voice  
404-524-6611 - facsimile



## APPENDIX — 19-A

UNITED STATES OF AMERICA

**MERIT SYSTEMS PROTECTION BOARD**

EVELYN L. JOHNSON, )  
 )  
 Appellant, )  
 ) DOCKET  
 ) NUMBER  
 v. ) AT-0752-03-0934-I-1  
 )  
 )  
 ADMINISTRATIVE OFFICE) )  
 OF THE U. S. COURTS, )  
 Agency. )

**To: Merit Systems Protection Board**

## RESPONSE TO PETITION FOR REVIEW

The Administrative Office of the United States Courts (agency) respectfully urges the Merit Systems Protection Board to deny the petition for review filed by Evelyn L. Johnson.<sup>1</sup> The petition for review challenges an initial

<sup>1</sup> The initial decision in this case specified the Administrative Office as the respondent. Appellant is, however, an employee of the United States Court of Appeals for the Eleventh Circuit, appointed by the senior staff attorney under 28 U.S.C. § 715(b). The Administrative Office is a separate agency within the judicial branch, created under 28 U.S.C. § 601, whose employees are appointed by the director of the Administrative Office under 28 U.S.C. § 602. As set forth in 28 U.S.C. § 604, the Administrative Office performs administrative duties with respect to the courts. 28 U.S.C. § 609 provides that the authority of the courts to appoint their own clerical or administrative personnel shall not be limited by the statutory provisions concerning the Administrative Office.

**[Pet.'s Note: The AO is not a separate agency within the judicial branch. AO is the only administrative agency within the**

## APPENDIX — 19-A

decision issued by the administrative judge on October 9, 2003, dismissing appellant's appeal because it was withdrawn by the appellant. Appellant's petition does not establish either that new and material evidence is available that, despite due diligence, was not available to her at the time she withdrew her appeal; or that the decision of the administrative judge is based on an erroneous interpretation of statute or regulation. 5 C.F.R. § 1201.115(d). The additional material submitted by Ms. Johnson, dated November 22, 2003 does not alter these conclusions, or otherwise show that the Board has jurisdiction over her appeal.

As shown by Attachment A, appellant was originally appointed to an excepted position as a court secretary with the staff attorney in the United States Court of Appeals for the Eleventh Circuit, effective January 17, 1989. Attachment B reflects that she was promoted to the position of human resources coordinator effective September 10, 2001. Appellant was appointed under 28 U.S.C. § 715(b) which provides that a senior staff attorney, who is appointed by the chief judge of the court of appeals under section 715(a), may appoint necessary staff attorneys and employees with the approval of the chief judge. Although the initial decision states that appellant was removed from her position effective June 27, 2003, her removal did not in fact occur until November 14, 2003, after the filing of her petition for review.

Appellant first contends that the dismissal of her appeal should be reversed and her appeal reopened. Respondent believes that the appeal was properly dismissed and that it should not be reopened. In the initial decision

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judicial system, adopted by the Judicial Conference of the U.S. under the Congressional Act of 1995. *AOUSC CH 1, 1. Preamble, 2. Scope of Coverage, & 3. Definitions A-D. (See Appendix F, Tabs 2-6, 8); 2 U.S.C. § 1434.*

## APPENDIX — 19-A

dismissing the appeal, the administrative judge cited Luellen v. U.S. Postal Service, 88 M.S.P.R. 11 (2001), which held that a request for reconsideration of an appellant-initiated dismissal of an appeal should generally be treated as a late-filed petition for appeal, or as a request to reopen and reinstate a prior appeal.

With respect to the first criterion, Luellen, held that good cause must be shown for the untimely filing of an appeal, and that pursuit of a remedy in another forum does not constitute good cause. Appellant is apparently arguing that the court should not have dismissed a complaint that she filed under the court's internal employment dispute resolution plan. Under Luellen, appellant's pursuit of an employment dispute resolution complaint with the court, or the dismissal of that complaint, is not grounds for late filing of her appeal. Moreover, although circumstances have changed since the filing of her petition for review, in that she has been removed from her position, as set forth below the Board lacks jurisdiction to consider an appeal of that removal.

With respect to the second criterion, Luellen held that an appellant's withdrawal of an appeal is an act of finality that has the effect of removing the appeal from the Board's jurisdiction, and that absent unusual circumstances, such as misinformation or new and material evidence, the Board will not reopen or reinstate an appeal merely because the appellant now wishes to proceed before the Board. The only allegation of new information raised by the appellant is that the agency (presumably the court or the staff attorney's office) informed her of "employment rights" after dismissal of her complaint. It is not clear what the appellant means here, i.e., whether she is referring to some aspect of her employment dispute resolution complaint, or whether she is arguing that she found out new information regarding her right to file an appeal, either within the court or with the Board. In either event, she does not indicate what new information is. Although she does raise several arguments

## APPENDIX — 19-A

concerning Board jurisdiction, none of those arguments provides a basis for considering her appeal.

The Board's jurisdiction to review personnel actions by government agencies is not plenary but is instead limited to areas specifically authorized by statute or regulation. See Collaso v. M.S.P.B., 775 F.2d 296, 297 (Fed. Cir. 1985); 5 U.S.C. § 7701(a). Section 7701(a) provides that employees may appeal to the Board only those actions that are made appealable "under any law, rule, or regulation." However, there is no law, rule, or regulation authorizing appellant to appeal to the Board.

Appellant contends that the Board has jurisdiction to review a removal for unacceptable performance of a non-preference eligible employee in the excepted service with two or more years of current continuous service. 5 U.S.C. § 4303(a) authorizes removal of an employee for unacceptable performance. Section 4303(e) provides that any "employee" who is a preference eligible, in the competitive service, or in the excepted service and covered by chapter II of 5 U.S.C. chapter 75, and who is removed under section 4303, is entitled to appeal the removal to the Board. Appellant does not fall under this provision, first, because she was not removed under section 4303. Section 4303 provides that "an agency" may remove an employee for unacceptable performance. 5 U.S.C. § 4301 defines "agency" for this purpose to include executive agencies and the Government Printing Office. Since appellant was an employee of the judicial rather than the executive branch, she does not fall under this provision.

She also was not an "employee" within the meaning of section 4303(e). The term "employee" is defined by section 4301 to include "an individual employed in or under an agency;" as indicated above, appellant was not an employee of an "agency." In addition, she was not a preference eligible, and was in the excepted rather than the competitive service.<sup>2</sup>

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<sup>2</sup> The competitive service is defined to include "all civil service positions in the executive branch," with certain exceptions, and "civil service positions not in the executive branch which are specifically

## APPENDIX — 19-A

Finally, she was not an excepted service employee covered by 5 U.S.C. chapter 75, subch. II. Section 751(a)(1) defines "employee" for purposes of that subchapter to include (A) an individual in the competitive service; (B) a preference eligible in the excepted service or in the United States Postal Service or Postal Rate Commission; and (c) an individual in the excepted service who either is awaiting conversion to the competitive service and is not serving a probationary period, or has completed two years of current continuous service in an executive agency. Appellant did not fall within any of these categories. She was a non-preference eligible in the excepted service but was not serving in an agency with competitive service positions or in an executive agency. She therefore was not an employee within the meaning of section 7511(a)(1) and the Board lacks jurisdiction to hear her appeal. Hartman v. M.S.P.B., 77f.3d 1378 (Fed. Cir. 1996). See also Williams v. McClellan, 569 F.2d 1031, 1033 (8<sup>th</sup> Cir. 1978) (judicial branch positions similar to the one occupied by appellant are outside of the competitive service and are not covered by any merit or civil service system. [Pet.'s Note: The instant case before the Court is distinguishable from the cases cited supra.]

Appellant further cites 5 U.S.C. §§ 1221(a) and 2103(b) as a basis for Board jurisdiction. Section 1221(a) provides for an individual right of action for an "employee, former employee, or applicant for employment . . . with respect to any personnel action taken . . . as a result of a prohibited personnel practice described in section 2302 (b)(8)." 5 U.S.C. § 2302(b)(8) prohibits an employee from taking a "personnel action" against an employee or applicant

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included in the competitive service by statute." 5 U.S.C. §2102. Since appellant was employed in the judicial branch, and since nothing in 28 U.S.C. § 715(b) or in any other provision of the United States Code includes staff attorney employees in a court of appeals in the competitive service, they are in the excepted service. [Pet.'s Note: Most staff attorneys are appointed as term or temporary employees. Unlike administrative support staff and deputy clerks, who are permanent employees, court chambers' clerks and assistants, and staff attorneys are all appointed under different statutes; therefore, appointees' positions could not be defined under a singular statute.]



## APPENDIX — 19-A

who makes certain whistleblowing disclosures. "Personnel action" is defined by section 2302(a)(2) as specified actions taken with respect to an "employee in, or applicant for, a covered position in an agency." The term "agency," in turn, is defined to include executive but not judicial branch agencies. 5 U.S.C. §2302(a)(2)(C). Thus, appellant has no individual right of action under 5 U.S.C. § 1221(a). See Hartman v. M.S.P.B., 77f3.D 1378 (Fed Cir 1996). Moreover, 5 U.S.C. § 2103(b) is merely the definition of the excepted service and does not provide any appeal rights.

Appellant further cites provisions of 5 U.S.C. chapters 83 and 84, and accompanying provisions of the Code of Federal Regulations, as providing a basis for her to appeal to the Board. The provisions cited refer only to appeals regarding administrative actions or orders affecting the retirement rights or interests of an individual; no such administrative action or order has been cited by appellant.

Finally, appellant contends that the Board has jurisdiction over her appeal based on her complaint of discrimination. Her November 22, 2003, letter makes additional arguments regarding discrimination, based on the employment dispute resolution complaint that she filed with the court. There is no statute or regulation providing for Board jurisdiction over a complaint of discrimination by a court employee. 5 U.S.C. § 7702(a) provides for Board jurisdiction where an employee (A) has been affected by an action that the employee may appeal to the Board, and (B) alleges that a basis for the action was discrimination prohibited by certain statutes, including section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16). Since there is no basis for Board jurisdiction here, appellant has not been affected by an action that she may appeal to the Board. Moreover, section 2000e-16 provides that all personnel actions affecting employees in "those units of the legislative and judicial branches of the Federal Government having positions in the competitive service" shall be made free from discrimination. Since all staff attorney employees are appointed under 28 U.S.C. § 715(b) and are in the excepted service, appellant was not employed in a unit of the judicial branch having positions in the competitive service, and

## APPENDIX — 19-A

section 2000e-16 therefore is inapplicable.

[Pet.'s Note: Respondent's analysis here is incorrect. (See Appendix F for other civil service rules under the Code of Federal Regulations. Furthermore, Petitioner alleged intentional discrimination and disparate treatment due to several instances of non promotion, filed under Title VII of the Civil Rights Act of 1964 on the basis of national origin, color, sex, race, and age at the very outset of the filing of the complaint.).

In conclusion, appellant does not cite any new evidence that would indicate that her appeal should be reopened, nor does she establish any error of law in the initial decision or cite any other legal rationale that might provide a basis for the Board to exercise jurisdiction. Accordingly, the petition for review should be denied.

Respectfully submitted,

/s/ Susan T. Kattan

Susan T. Kattan

Assistant General Counsel

Administrative Office of the

United States Courts

One Columbus Circle, N.E.

Washington, D.C. 20544

(202) 502-1100

Date: December 4, 2003



APPENDIX — 20-A

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October 8, 2003

**VIA FACSIMILE & FIRST CLASS MAIL**

Merit Systems Protection Board

Atlanta Regional Office

401 West Peachtree Street, N.W.

Suite 1050

Atlanta, Georgia 30308

Facsimile: 404-730-2767

Re: Evelyn Johnson v. Staff Attorneys' Office, U. S.  
Court of Appeals for the Eleventh Circuit

Dear Sir/Madam:

Enclosed please find a "Notice of Withdrawal of Appeal," pursuant to Ms. Evelyn Johnson's previously filed Merit Systems Protection Board appeal. A copy of this notice has been sent to the other party.

Thank you for your cooperation in this matter. Please do not hesitate to contact me if you have any questions.

Very truly yours,

MELVILLE JOHNSON, P.C.

/s/ Dawn M. Rivera, Esq.

Attorney at Law

DMR:me

Enclosure

cc: Ms. Evelyn Johnson

APPENDIX — 20-A

MERIT SYSTEMS PROTECTION BOARD

ATLANTA REGIONAL OFFICE

EVELYN JOHNSON )  
Appellant, )  
 )  
v. )  
 )  
STAFF ATTORNEYS )  
OFFICE U.S. COURT )  
OF APPEALS FOR THE )  
ELEVENTH CIRCUIT, )  
Agency. )  
\_\_\_\_\_ )

DOCKET NUMBER  
AT-0752-03-0934-I-1

October 8, 2003  
DATE

NOTICE OF WITHDRAWAL OF APPEAL

COMES NOW Appellant, Evelyn L. Johnson, by and through counsel, Melville Johnson, P.C., and hereby withdraws her Appeal against the Staff Attorneys' Office, U. S. Court of Appeals for the Eleventh Circuit.

Respectfully submitted this 8<sup>th</sup> day of October 2003.

MELVILLE JOHNSON, P.C.

/s/ Dawn M. Rivera  
Dawn M. Rivera  
Georgia Bar No. 002535

44 Broad Street, N.W.  
Suite 222, The Grant Building  
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404.524.9111 - voice  
404.524.6611 - facsimile

APPENDIX — 20-A

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November 18, 2003

Ms, Evelyn Johnson  
6241 S. Skyline Drive  
Douglasville, GA 30135

Re: Evelyn Johnson v. Administrative Office of the U.S.  
Courts

Dear Ms. Johnson:

We received a copy of a letter sent to you by the Merit Systems Protection Board regarding your letter to MSPB Judge Cummings requesting that he re-open your appeal. MSPB has apparently construed your request as a petition for review.

As you may recall, you agreed last month to withdraw your MSPB appeal after this firm advised that no basis exists for MSPB to exercise jurisdiction over your appeal. MSPB and federal courts have held that federal court employees are employed by their local courts, not by the Administrative Office of the Courts. As a result, you were not an "employee" as that term is defined under MSPB jurisdictional guidelines, despite your participation in federal retirement programs. Pursuant to those precedents, we filed a Notice of Withdrawal of Appeal on your behalf on October 8, 2003.

APPENDIX — 20-A

As we previously stated, we will not be responding on your behalf to communications from MSPB. It is our recommendation that you once again withdraw your MSPB petition. Instead, we will continue pursuing the administrative process of the Eleventh Circuit, including a final decision on your EDR complaint. **[Pet.'s Note: Although Petitioner did not agree over the phone with the retained counsel to withdraw Petitioner's petition with the MSPB, Ms. Rivera and her firm decided for the Petitioner without her express permission. This is evidenced by Petitioner's continued pursuit to adjudicate her case through the MSPB.]**

Thank you for your cooperation in this matter. Please do not hesitate to contact me if you have any questions.

Very truly yours,

MELVILLE JOHNSON, P.C.

/s/ Dawn M. Rivera

Dawn M. Rivera  
Attorney at Law

DMR:me

## APPENDIX — B

[1 — 10]

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APPENDIX — 1-B

UNITED STATES COURT OF APPEALS  
ELEVENTH CIRCUIT

---

Room 416, 56 Forsyth Street  
Atlanta, Georgia 30303

**J. L. EDMONDSON**  
Chief Judge

21 November 2003

Dawn M. Rivera, Esq.  
Melville & Johnson, P. C.  
44 Broad Street, N.W.  
Suite 222, The Grant Building  
Atlanta, Georgia 30303

Dear Ms. Rivera:

Thank you for your letter of 19 November.

I intend to look again at the status of Ms. Johnson's EDR complaint. I hope that you will hear from me in the not distant future.

Sincerely,

/s/ J. L. Edmondson  
J. L. Edmondson  
Chief of the Eleventh

**APPENDIX — 1-B**

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November 19, 2003

**VIA CERTIFIED MAIL**

**No. 7002 0510 0004 3500 4834**

Chief Judge J. L. Edmondson  
U.S. Court of Appeals  
Eleventh Judicial Circuit  
56 Forsyth Street, N.W.  
Atlanta, GA 30303

Re: Evelyn Johnson v. Staff Attorney's Office, U.S. Court  
of Appeals for the Eleventh Circuit

Dear Chief Judge Edmondson:

This letter is written in response to your letter to Ms. Godfrey dated November 13, 2003, in which you stated that the decision of Judge Brill in the Adverse Personnel Action hearing requested by Ms. Johnson took into account Ms. Johnson's EDR claims. It is our understanding that the Court's EDR Plan requires that the chief judge or a designated judicial officer either "dismiss in writing any complaint that is found to be plainly without merit, untimely, or unduly repetitive of a previous complaint, that fails to state a claim upon which relief may be granted, or that makes claims that were not advanced in mediation," or "hold a hearing on the merits of the complaint."

In addition, we are unaware that you have designated any judicial officer to act on your behalf regarding Ms. Johnson's EDR Complaint. Although Ms. Johnson requested



## APPENDIX — I-B

that her EDR hearing be consolidated with her Adverse Personnel Action hearing, in compliance with the suggestion that you and Mr. Phelps appeared to be making, Judge Brill denied the Motion to Consolidate. Therefore, no action whatsoever has been taken yet on Ms. Johnson's EDR claims, which she initiated on July 16, 2003.

**[Pet.'s Note: Petitioner's counsel's statement here clearly denotes the inappropriate and unethical conduct of Respondents and others involved, when they got rid of Petitioner's 2003 EDR retaliatory complaint at the December 8, 2003, "hearing" without appropriate notice to the Petitioner.]**

Further, Judge Brill's adverse personnel action decision provides no indication whatsoever that she considered the issue of whether Ms. Johnson's superiors were motivated by discriminatory animus when they terminated Ms. Johnson's employment. Instead, Judge Brill stated that she considered the issue of whether the SAO had sufficient cause to terminate the employment of Ms. Johnson. However, both Ms. Godfrey and Ms. Gilibert testified that their reasons for deciding to terminate Ms. Johnson's employment included their perceptions that Ms. Johnson suffers from a mental disability.

**[Pet.'s Note: Petitioner vehemently disagrees to Respondents' assertion that Petitioner's termination was due to her "suffer[ing] from a mental disability." Petitioner's marked emotional distress and suffering were clearly manifested by Respondents' intentional, malicious, and cruel emotional tortures without cause, they inflicted to Petitioner.]**

For example, when asked the reason for the termination decision, Ms. Godfrey testified, "Well, it was based upon the obstinate behavior as well as the unstable mental state that I perceived and other did also, and the

## APPENDIX — I-B

inability of us, my office, to do what we conceived of doing when we created that unit." (Id. at p. 95). Ms. Godfrey further testified that she did not know whether Ms. Johnson was actually unable "to cooperate and to function properly" or whether Ms. Johnson was simply refusing to do so. (Id.). Ms. Godfrey expressed a fear that Ms. Johnson's mental state made Ms. Johnson a danger to herself. (Id. at 130). Ms. Godfrey stated her belief that Ms. Johnson's concerns about computer surveillance were "paranoid" and resulted from "paranoia." (Id. at 94, 117). In addition, Ms. Godfrey stated a belief that Ms. Johnson's request for an adverse personnel action hearing may indicate that "Evelyn is seriously ill." (Id. at 130).

Ms. Gilibert also testified that her concerns about the "emotional state" of Ms. Johnson motivated her decision to terminate Ms. Johnson's employment. (Adverse Personnel Action hearing, p. 75). Ms. Gilibert explained that Ms. Johnson's "belief that there was computer surveillance was pretty much the fact that led to the final termination. It was very disturbing and concerning. I think that there [were] things that I considered emotionally driven, things that concerned me, but when she started believing or indicating that she believed there was a conspiracy and there was computer surveillance, it was a very big concern of mine that I thought the EAP could help her with." (Id. At p. 70) When asked the reason for the termination decision, Ms. Gilibert responded: "I believe they attempted on more than one occasion to have her do her work in the way that was asked of her and she would not do it. I think in addition to that, her emotional state at that point was very concerning any help that was offered was refused." (Id. at 75).

**[Pet.'s Note: See Petitioner's record on appeal (ROA) Vols. 1-12, material evidence supporting all of Petitioner's allegations on the entire complaint, which are under the custody of the Clerk of the Federal Circuit Court of Appeals. The ROA filed with the**

## APPENDIX — 1-B

**Federal Circuit were true copies of documents, filed with the employing office, from start to finish of the entire EDR process.]**

These statements establish at least a mixed motive for the termination decision at issue. Ms. Johnson's former superiors have articulated their perceptions that Ms. Johnson suffers from a mental disability and clearly stated that these perceptions motivated their decision to terminate Ms. Johnson's federal employment. This testimony constitutes direct evidence of disability discrimination.

However, no indication exists in Judge Brill's decision that she made any determination regarding whether a mixed motive existed for the termination decision or whether the SAO would have taken the same adverse personnel action in the absence of their admitted discriminatory motive. Further, such a determination would have required that Ms. Johnson be permitted to engage in discovery pursuant to the EDR Plan. Thus, despite Ms. Johnson's best efforts to obtain relief under the Court's Employment Dispute Resolution Plan for violations of her right to equal employment opportunity, no action whatsoever has been taken under the EDR Plan. If further action on Ms. Johnson's part is required for her to obtain due process under the Court's EDR Plan, we hereby request further instruction.

Please do not hesitate to contact me if you have any questions.

Very truly yours,

MELVILLE JOHNSON, P.C.

/s/ Dawn M. Rivera, Esq.

DMR/me

cc: Ms. Evelyn Johnson

**APPENDIX — 2-B**

**UNITED STATES COURT OF APPEALS**

**FOR THE ELEVENTH CIRCUIT**

**ADVERSE PERSONNEL ACTION**

**POLICY PROCEEDINGS**

**IN RE: Complaint of Evelyn Johnson**

**NOTICE TO THE PARTIES**

A hearing was conducted on this matter on October 29, 2003 pursuant to the Eleventh Circuit Court of Appeals Adverse Personnel Action Policy ("Adverse Action Policy"). The final decision of the designated judicial officer must be issued not later than ten (10) calendar days after the conclusion of the hearing. The attached document is being issued within the prescribed period and constitutes the undersigned's final decision in this matter.

In chambers, Atlanta, Georgia this 6<sup>th</sup> day of November 2003.

/s/ Gerrilyn G. Brill  
GERRILYN G. BRILL  
United States Magistrate Judge  
(Designated Judicial Hearing Officer)

## APPENDIX — 2-B

IN RE: Complaint of Evelyn Johnson

### DECISION OF THE JUDICIAL OFFICER

This is a proceeding pursuant to the Eleventh Circuit Court of Appeals Adverse Action Policy. Evelyn Johnson ("Petitioner") contends that the Staff Attorneys' Office for the Eleventh Circuit Court of Appeals ("SAO") has terminated her employment without sufficient cause.<sup>1</sup> For the reasons discussed below, the relief requested by Petitioner must be **DENIED** and the Adverse Action against Petitioner should be **APPROVED**.

### Procedural History

Petitioner began working for the SAO as an Administrative Assistant in January 1989. (Tr. 134-135).<sup>2</sup> On June 20, 2003, SAO Senior Staff Attorney Naomi Godfrey

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<sup>1</sup> The parties disagree as to the standard that should be applied by the undersigned in deciding whether the adverse action should be approved. Petitioner argues that the SAO must show "substantial evidence" to justify her termination. The SAO argues that it need only show that its action was not "totally without merit." Assuming, without deciding, that Petitioner is correct, the Court finds that the SAO has shown substantial evidence to justify the termination of Petitioner's employment.

<sup>2</sup> All transcript references are to the transcript of the October 29, 2003 hearing. Similarly, all references to exhibits are to documents submitted by the parties at the hearing.

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wrote a letter to Petitioner informing her that she was being terminated due to "insubordinate behavior, unsatisfactory work, and inappropriate conduct in the discharge of [her] responsibilities." (Def. Ex. 11). On June 26, 2003, Petitioner made a written request for a hearing on her proposed termination, as permitted under the Adverse Action Policy. Chief Judge J.L. Edmondson granted Petitioner's request and designated the undersigned Magistrate Judge to conduct the hearing. The hearing was held on October 29, 2003, with Petitioner, Ms. Godfrey, Sara Gilibert, and counsel for both parties in attendance.

### **Background Facts**

The facts set forth herein are based on the testimony and documentary evidence submitted at the hearing, and papers submitted during the Adverse Action Policy process, which the undersigned finds admissible and credible. Unless specifically cited herein, the contents of particular exhibits were not relied upon by the undersigned in reaching this final decision.

Petitioner transferred to the Eleventh Circuit SAO in 1989 as an Administrative Assistant. (Tr. 134-135). On



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September 10, 2001, she was promoted to Human Resources Coordinator. (Tr. 100-102). While certain aspects of Petitioner's duties may have changed over the years, she continued working in that general capacity through the date of the evidentiary hearing. (Tr. 136-138). In 1995, Ms. Godfrey was promoted to Senior Staff Attorney and became Petitioner's indirect supervisor. (Tr. 83, 96). Ms. Godfrey remained in that position through the date of the evidentiary hearing. (Id.).

In October 2001, the SAO decided to create a new intermediate supervisory position in the personnel department called Manager of Recruiting. (Tr. 103-104, Def. Ex. 1). The new Manager would report directly to Ms. Godfrey and would be responsible for overseeing the day-to-day work of the recruiting, hiring and personnel staff. (Def. Ex. 1). Petitioner apparently applied for, but was not awarded, this position. (See EDR Hearing Decision dated Nov. 14, 2002, at p. 11, attached as Ex. B to Def. Resp. to various motions filed by Petitioner). [Pet.'s Note: **Although Petitioner applied for the position when it was re-advertised the second time, Petitioner's**



## APPENDIX — 2-B

application was never considered, and the only application that did not go through the normal recruiting process.]. Instead, an attorney named Sara Gilibert was hired to fill the position. (Tr. 10).

Ms. Gilibert began working as the SAO Recruitment Manager on January 22, 2002. (Id.) Her duties included supervising Petitioner and Jackie Williams, another member of the SAO support staff. (Tr. 11).

Over the next few months, Ms. Gilibert began to perceive that Petitioner resented her efforts to act as Petitioner's supervisor. (Tr. 19). On numerous occasions, Petitioner was slow to respond, or did not respond at all, to Ms. Gilibert's requests for information. (Tr. 18). For example, when Ms. Gilibert's repeatedly asked Petitioner to write up a list of her job responsibilities to assist with a possible restructuring of the work assignments, Petitioner did not do so. (Tr. 12-13). Ms. Gilibert than drafted the list on her own and asked Petitioner to provide comments; however, Petitioner did so only after a lengthy delay and additional requests from Ms. Gilibert. (Tr. 14). Petitioner's work summary during this period suggests that she had time

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to do the requested task. (Tr. 15; Def. Ex. 2). [**Pet.'s Note: Petitioner felt harassed due to retaliatory actions she was being subjected.**].

On another occasion, Ms. Gilibert asked Petitioner to call Jen Kirby, a newly-hired SAO employee, to find out when she planned to start work. (Tr. 23). Ms. Gilibert explained to Petitioner that the call had to be made within the next ten minutes, because Ms. Kirby was out of town and was waiting by the telephone. (Id.). Despite these instructions, Petitioner did not immediately make the call. (Id.). Upon walking back to her office, however, Ms. Gilibert noticed that Petitioner still had not left the copy center. (Id.). Petitioner went to make the call only after Ms. Gilibert returned to the copy center and ordered Petitioner to the telephone. (Id.).

During 2002, there was "very, very little communication" between Petitioner and Ms. Gilibert. (Tr. 20). Most of the time, Petitioner did not respond to Ms. Gilibert's e-mails. (Tr. 24). Although Ms. Gilibert generally gave Petitioner assignments orally, in person, Petitioner would usually place the completed assignments in Ms.

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Gilibert's mailbox rather than speaking to her directly. (Tr. 20-21). Petitioner rarely called Ms. Gilibert on the phone, and "would never come to [Ms. Gilibert's] office." (Tr. 20). Ms. Gilibert believed that "if [Petitioner] could avoid . . . contact [with Ms. Gilibert], . . . she would." (Id.). As a result, Ms. Gilibert "had to follow-up quite frequently" with Petitioner about assignments. (Tr. 22). According to Ms. Gilibert,

There were a lot of things I never received. There are things that I asked to be done and I didn't realize they hadn't been done until something was asked f[or] — one of the examples is personnel files. One of the judges had requested resumes and transcripts from a certain individual's personnel files and they weren't fresh copies. They were written on and everything else. And that was something that I had asked [Petitioner] to do and it was something I found out at [the] last minute. . . . I rushed and started redacting and trying to get liquid paper . . . so we could get a clean copy to the judges in a timely manner. But things like that would come up where I didn't know the project was not completed until something like that happened.

(Id.).

On December 4, 2002, Ms. Gilibert sent Petitioner an e-mail asking her to set up some meetings to go over separation paperwork with attorneys who were leaving the

## APPENDIX — 2-B

SAO's office. (Tr. 25; Def. Ex. 4). On December 6, 2002, having received no return e-mail from Petitioner, Ms. Gilibert sent a follow-up e-mail asking Petitioner to "please respond" and "simply let [her] know that the [Dec. 4] e-mail was received and that any requests set forth therein will be taken care of." (Tr. 26, Def. Ex. 4). The e-mail noted that there were "several things [Ms. Gilibert] ha[d] asked [Petitioner] to do in the past few weeks and, to my knowledge, they have not yet been completed. . . ." (Id.).

That afternoon, Petitioner sent Ms. Gilibert a reply e-mail that simply read "Please see attached." (Tr. 27, Def. Ex. 4, p. 2). Attached to the e-mail was a two-page Word Perfect document written by Petitioner and addressed "Sara." (Id.).

The tone of this document was hostile. The first paragraph reads:

I resent the fact that you keep getting on my back to know if the job is done or not. Before you even came to work here for the last 13 years, 10 months, and 19 days, nobody had been keeping tabs if my work has been done or not, that is, with more work and less help. I do have initiative, self-directed, and do get the job done. I am not a kid and do not have to be told twice, and most of all, I do resent your attitude for doing that. . . .

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(Def. Ex. 4, p. 2). The letter then outlined the status of the matters that had been assigned to Petitioner, using phrases such as “[F]or your information, I spoke with [name omitted] . . . .,” “[F]or your additional information . . . .,” and “You have no clue how long it takes to put together that report. . . .” (Id.). The document also states: “I have been doing this for almost four years, and granted there could be snafus to occur, [sic] don’t blame it here.” (Id.). Petitioner then takes issue with some of the work Ms. Gilibert had assigned to Petitioner. (Id. at p. 3). For example, Petitioner states: “The chart you are talking about, Cathy Hester puts it out, why am I to update it” She should update that . . . .” (Id.). The letter concludes with the following statement:

Last but not least, if you ask me to do something, consider it done. You have not been here long enough to know everything, and to preserve harmony, please stay off my back. Thank you.

(Id.). [Pet.’s Note: Petitioner, at this point, was already sick and tired of daily work scrutiny, threats, and harassment.].

Ms. Gilibert was “really, really taken aback” by Petitioner’s letter and felt that “the level of disrespect, of

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emotional anger, . . . was quite shocking.” (Tr. 28-29). She printed a copy of the e-mail and took it to Petitioner’s office to discuss it with her. (Tr. 29). At that point, Petitioner told Ms. Gilibert that she had never been supervised before, that it made her feel like she was being treated like a child, and that there was “a lot going on” that Ms. Gilibert didn’t know about. (Tr. 30). Petitioner became very “emotional and . . . upset” and continued to say that “[t]here’s a lot going on, but I don’t want to go there.” (Id.). The meeting concluded with Ms. Gilibert telling Petitioner that her conduct had been “insubordinate” and “absolutely unacceptable” and that it could not happen again. (Tr. 31). **[Pet.’s Note: Not true. Petitioner worked under the supervision of Karen Sinyard and Naomi Godfrey. Petitioner stated she was self-directed, worked independently with little supervision.]**

In January 2003, Karen Sinyard, the SAO’s Administrative Manager, asked all of the SAO employees to give her their computer passwords. (Tr. 31). Ms. Sinyard did not request the employees’ e-mail passwords; only their general Windows passwords. (Id.). The purpose of this



## APPENDIX — 2-B

request was to allow the SAO supervisors to access business documents on an employee's hard drive if it became necessary during an employee's absence. (*Id.*). Petitioner refused to provide her password. (Tr. 32). [Pet.'s Note: Karen Sinyard never had problems with Petitioner on this issue before, but only after Petitioner realized the SAO was monitoring her computer, creating computer problems and impeding her work. Disclosures of passwords mostly apply to staff attorneys so another staff could access a staff attorney's PC when he/she is out, and judge(s) requested that the attorney's prepared memo e-mailed to them directly.].

On February 5, 2003, Ms. Gilibert sent Petitioner an e-mail asking her to "please open and respond to e-mails from all court personnel in a timely manner." (Tr. 32-33; Def. Ex. 6). When Petitioner asked what e-mails Ms. Gilibert was referring to, she replied that Petitioner was the only SAO employee who had not answered Ms. Sinyard's e-mail asking for her current computer password. (Tr. 34-35; Def. Ex. 7). Petitioner responded to Ms. Gilibert with the following message:



## APPENDIX — 2-B

I know I have not responded to Karen's requests for password because I know if she needs to, she already has access to my computer and printer. . . . WE are the only ones supposed to know our password even the automation employees don't have our password, and we are not to give it out to anyone if there is nothing on the computer that another employee would have any need to access. Nevertheless, Karen still has access to my computer without me giving her my password. If this becomes such a big issue, Karen can remove the computer out of my office. Thanks.

(Def. Ex. 7) (emphasis in original). Petitioner did not provide her password in the message. (Id.).

That same day, Ms. Gilibert gave Petitioner a "letter of warning" based on Petitioner's "refusal and/or failure to comply with an appropriate instruction from [her] supervisor." Tr. 36; Def. Ex. 8). The letter continued:

I have specifically asked you to forward your current computer password to the office's Administrative Manager, Karen Sinyard. As I informed you, it is important that we maintain a master list of all current passwords, and you are the only employee in the office who has yet to provide one. This is despite two e-mail requests from the Administrative Manager and a directive from me.

Once again, you are expected to forward current computer password to the Administrative Manager immediately. Should

## APPENDIX — 2-B

you fail to do so, the consequence will result [sic] in further corrective and/or adverse action, up to and including immediate dismissal.

(Id.). Despite this warning, Petitioner continued to refuse to provide her password for some time. <sup>3</sup>

After this incident, Ms. Gilibert observed Petitioner crying on several occasions. (Tr. 38). At these times, Petitioner told Ms. Gilibert that she was going to have to “file” something and that Ms. Gilibert “shouldn’t be in the middle of this.” (Id.). Ms. Gilibert received “absolutely no communication” from Petitioner “despite any efforts.” (Id.). **[Pet.’s Note: Yes, due to demoralizing work, hostile environment, and daily harassment.].** If Petitioner made a mistake in her paperwork, Ms. Gilibert would not find out about it until a staff attorney or other employee brought it to her attention. (Tr. 38-39). Because of Petitioner’s conduct, Ms. Gilibert frequently found herself performing tasks that she would otherwise have delegated to Petitioner. (Tr. 39).

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<sup>3</sup> See Def. Exh. 10 (March 12, 2003 letter from Ms. Gilibert to Petitioner stating “Despite three directives from me [including a written warning], you have refused or declined to disclose the password to your government-supplied computer. . . .”

## APPENDIX — 2-B

[Pet.'s Note: Petitioner wondered what mistakes attorneys or employees (and who were they?) brought to Gilibert's attention? Petitioner used to do all the work, by herself, at four grades lower than Gilibert, for almost four (4) years with no known problems, and evidenced by excellent performance evaluations before Gilibert's employment there].

At about the same time, Petitioner began having problems with her computer. She told Ms. Gilibert that there was a conspiracy to watch her through computer surveillance. (Id.). At one point, Petitioner e-mailed Norman Zoller, the Circuit Executive, and J.L. Edmondson, Chief Judge of the Eleventh Circuit Court of Appeals, about a problem she was having with her printer. (Def. Ex. 9). In the e-mail, which Ms. Gilibert considered "highly inappropriate," Petitioner used phrases such as "I am trying to work here . . . ." and "This inappropriate action needs to stop." (Tr. 40, Def. Ex. 9). [Pet.'s Note: Petitioner e-mailed them to report the computer breach and constant PC problems due to PC monitoring. About the same time frame, Naomi Godfrey asked Sara

## APPENDIX — 2-B

Gilibert to refer Petitioner to EAP to document anything they could use against Petitioner and malign her character, as they wanted to terminate Petitioner's employment.].

Ms. Gilibert became concerned about Petitioner's behavior that, on March 12, 2003, she referred her to the Employee Assistance Program ("EAP"), a confidential counseling service for federal employees. (Tr. 40-41; Def. Ex. 10). Ms. Gilibert did this because she "had reached a point where there was in [her] mind nothing that [she] could do to make [Petitioner] a productive member of [her] team." (Tr. 41). Ms. Gilibert saw the program as a "last-ditch attempt" for Petitioner to improve her performance. (*Id.*). In the letter referring Petitioner to the EAP, Ms. Gilibert states:

Despite repeated efforts to communicate with you (and to counsel you) over the past year, you have continued to display outward resentment toward being supervised and, at times, to blatantly refuse of fail to comply with appropriate instructions from me as your direct supervisor. . . . [Y]ou continue to carry out your duties only according to how you perceive them and respond to my efforts to align your priorities with those as assigned to me by my

## APPENDIX — 2-B

supervisors with indifference and hostility. My attempts to counsel you with the hopes of opening communication lines and improving specific work and attendance related deficiencies have been met by you with anger and resentment.

Despite three directives from me (including a written warning), you have refused or declined to disclose the password to your government-supplied computer.... Your continued refusal to supply your password creates inefficiencies, unneeded duplication, and unsatisfactory work.

**[Pet.'s Note: All happened in 2002 after filing the EDR complaint and death of Petitioner's mother.]**

You have refused to have your work reviewed by me before you summarily and without my prior authorization, distribute it office-wide, contrary to my express instructions. Some of these unilateral, unapproved distributions by you have resulted in inapplicable or erroneous information being disseminated.

**[Pet.'s Note: Nothing out of ordinary Petitioner had done in the past. Petitioner e-mailed SAO employees to pass on to them information from AO regarding taxes and COLA.]**

You have failed to communicate with me and with other administrative staff so as to reduce or minimize errors. On at least two occasions, I had instructed you to immediately contact other administrative staff whom you had been refusing to respond to despite their repeated attempts to reach you while you were present in the office.

\* \* \*

## APPENDIX — 2-B

You have challenged my authority as your supervisor and responded to my work requests with inaction, indifference or hostility. Your written remarks to me of December 6, 2002 that I should "stay off [your] back" and other confrontational comments are inappropriate, if not insubordinate.

\* \* \*

We have discussed these issues both formally and informally, but you have not wanted to discuss in detail the reasons for your conduct and performance. If these problems continue, some type of disciplinary action will be taken. I strongly recommend that you take whatever action is necessary to immediately improve. While I may not be fully aware of the reasons for these problems, I am concerned about them and about you. . .

Therefore, I direct you to contact the EAP. . . . You will be granted administrative leave to attend EAP sessions. . . . You are expected to fully cooperate and participate in the EAP. The conduct and performance problems I noted above must be corrected. With an effort on your part and help [from] EAP, I am hoping you can correct these issues.

(Def. Ex. 10, pp. 1-2). Although Petitioner initially made an appointment for EAP counseling, she did not keep the appointment. (Tr. 44). Petitioner received a letter of termination on June 20, 2003. (Def. Ex. 11).

### Discussion

It is the finding of the undersigned hearing officer



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that the Eleventh Circuit SAO had just cause to terminate Petitioner's employment. Petitioner's repeated insubordination, failure to communicate with and hostility toward her supervisor Ms. Gilibert, and other inappropriate conduct as described above, clearly justify the SAO's action.

Petitioner does not deny many of the basic facts Ms. Gilibert testified to in her direct examination. For example, she did not attempt to justify her delay in telephoning Jen Kirby or her delay in providing Ms. Gilibert with a list of her job duties. (Tr. 134-165). Petitioner admits that she and Ms. Gilibert "just don't communicate" (Tr. 156) and that there was "a lack of communication coming from [Petitioner]." (Tr. 165). **[Pet.'s Note: Due to the fact that Petitioner was kept out of the loop on everything related to her former duties and responsibilities, there was nothing to communicate to the Respondents. Rather, Respondents kept Petitioner in the dark about what was going on in the office, specifically personnel matters and administration.].** Petitioner also stated that she "felt uncomfortable" about giving Ms. Gilibert a written



## APPENDIX — 2-B

job description because she felt Ms. Gilibert was trying to "tak[e] over" her job duties:

Q. Would you want to explain why you felt uncomfortable about Ms. Gilibert's instructions to you [to write down your job duties]?

A. Well, because those were my duties and [Ms. Gilibert] wanted all the specifics . . .

. And rather than Ms. Godfrey addressing, you know, [Ms. Gilibert's] duties that were supposedly her duties rather than taking over my duties, it is just — to me, it 's just so appalling that I was even asked to do such a thing.

Q. Okay. So you found this instruction appalling?

A. Well, because what it is, just like I explained earlier, Ms. Gilibert' position came out of my original position, which I handled solely by myself for over three years without compensation. . . .

## APPENDIX — 2-B

(Tr. 159-160). Petitioner further testified that she found it “so annoying” that Ms. Gilibert kept “checking up on [her].” (Tr. 163). She admits she sent the e-mails attributed to her, including the one on December 6, 2002 telling Ms. Gilibert to “stay off her back.” (Tr. 163). She admits that the e-mail expressed her “tru[e] . . . feelings about Ms. Gilibert. (Id.). [Pet.’s Note: Yes, because Petitioner already had it with the Respondents due to Naomi Godfrey’s campaign, which included Karen Sinyard and Sara Gillibert, to make Petitioner’s life miserable by constant and daily harassment, threats of disciplinary action or termination without cause, due to her filing of the 2002 EDR complaint.]

Petitioner also admits that she refused to give her computer password to Ms. Sinyard for several months, despite repeated requests from Ms. Sinyard and Ms. Gilibert and a written letter of warning from Ms. Gilibert. (Tr. 146-147). In that regard, Petitioner testified:

Before, Karen Sinyard had asked for a password. I don’t have any problem. I gave it to her. But since last year that I have been through this mess at the office, . . . it’s just my way of, you know, telling her no. I’m not going

## APPENDIX — 2-B

to, you know, do it, because she has access on my computer already and I know it.

(Id.).<sup>4</sup>

Finally, Petitioner admits that she did not attend the EAP counseling that Ms. Gilibert ordered her to go to in an effort to improve her performance. (Tr. 154) (stating that she did not go because "that's another way of them to . . . malign my character."). **[Pet.'s Note: Why this kind of behavior? Petitioner did not resent Sara Gilibert's supervision but Respondents' actions, constant trivial work nitpicking, and character attacks without foundation.]**

In sum, Petitioner admits that she resented Ms. Gilibert's attempts to supervise her, that she sent a hostile

---

<sup>4</sup> Although Petitioner's counsel initially suggested that Petitioner did not give up her password because the office had a written policy prohibiting such disclosure, Petitioner later denied that this was the case:

Q. Ms. Johnson, am I correct that the basis of your refusal to give your password to Ms. Sinyard was something contained in what's been marked as plaintiff's exhibit number 1 (the "Automation User's Manual")?

A. No, not — I don't have any problems with that, like I said earlier, giving it to her before. The reason why I didn't want to give it to her is because I felt that she already knew my password and she's accessing my computer. I don't really need to give it to her. And it's just something that they are trying to do so document something.

## APPENDIX — 2-B

and insubordinate e-mail message to Ms. Gilibert, that she refused to provide her computer password despite numerous requests, and that she refused to go to counseling despite being warned that failure to resolve her behavior problems would result in her termination. Given these admitted facts, and the other evidence presented at the hearing, the Court finds that the SAO acted with just cause in terminating Petitioner's employment.

The Court further finds that Petitioner's June 26, 2003, request for a hearing, while generally permitted under the Adverse Action Policy, was pursued frivolously given the conduct Petitioner admits she engaged in with respect to Ms. Gilibert. The Court does not have sufficient information at the hearing, or whether her request for a hearing was motivated by a malicious intent. **[Pet.'s Note: NOT SO. Evidence Respondents provided were after-the-fact justification documenting Petitioner's upcoming involuntary termination due to her filing of 2002 EDR complaint. (See Appendix D, Respondents' Exhibits submitted in court at the October 29, 2003, Adverse Action Hearing. Note that the dates on those Exhibits**

## APPENDIX — 2-B

evidenced the fact that those documents were created and compiled while Petitioner was involved in the EDR process. Note also documents submitted by Petitioner throughout the process, where Petitioner was documenting Respondents' retaliatory actions, were same documents Respondents had submitted to court because there was nothing in Petitioner's record justifying Respondents' unlawful, evil spirited, intentional, and malicious adverse personnel actions Petitioner was put throughout the whole ordeal.].

### Conclusion

For the reasons set forth above, it is determined that Petitioner's June 26, 2003, request for relief under the Eleventh Circuit Adverse Personnel Action Policy should be **DENIED** and the termination of Petitioner should be **APPROVED**.

In chambers, Atlanta, Georgia this 6<sup>th</sup> day of November 2003.

/s/ Gerrilyn G. Brill \_\_\_\_\_  
Gerrilyn G. Brill  
United States Magistrate Judge  
(Designated Judicial Hearing Officer)

APPENDIX — 3-B

MELVILLE JOHNSON, P. C.  
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November 4, 2003

VIA FIRST CLASS MAIL

Mr. Robert Phelps  
EDR Coordinator & Chief Deputy Clerk  
U.S. Court of Appeals  
Eleventh Judicial Circuit  
56 Forsyth Street, N.W.  
Atlanta, GA 30303

Re: Evelyn Johnson v. U.S. Court of Appeals for  
the Eleventh Circuit

Dear Mr. Phelps:

This letter is written in response to your assertion that you are "without authority to proceed further" on Ms. Johnson's EDR claim and to your suggestion that the Adverse Personnel Action hearing on October 29, 2003, would somehow address claims of discrimination and retaliation made by Ms. Johnson several months ago, pursuant to the Court's Employment Dispute Resolution (EDR) Plan. **Please be advised that Judge Brill declined to consolidate the Adverse Personnel Action hearing and the EDR Complaint. Therefore, no action whatsoever has been taken yet on Ms. Johnson's EDR claims.**

As you may recall, Ms. Johnson, through counsel, timely requested consultation under the Employment



## APPENDIX — 3-B

Dispute Resolution Plan of the Court on July 16, 2003, pursuant to the Notice of Termination she received on June 20, 2003. In response, your only action appears to have been to send Ms. Johnson a Waiver of Confidentiality form. However, on August 18, 2003, you advised Ms. Johnson that consultation had ended. When this firm contacted you to request an explanation, you stated only that you thought Ms. Johnson had left the state. In fact, Ms. Johnson continues to reside in the Atlanta area, and it does not appear that either declining to waive confidentiality or traveling out of state negates your obligation to engage in the EDR process upon an employee's request. Further, you have failed to articulate what exactly you believe Ms. Johnson should have done to obtain consultation under the EDR Plan.

On September 5, 2003, Ms. Johnson requested information as to how you wished to proceed with her EDR claims and requested a copy of the EDR Plan. In response, you provided a copy of the Plan without the forms necessary to request mediation or a hearing. On September 12, 2003, after obtaining a copy of the form to request EDR mediation from SAO counsel, Ms. Johnson filed a request for EDR mediation. In response, on September 22, 2003, you advised that "matters related to issues Ms. Johnson has raised" would be addressed at the Adverse Personnel Action hearing. You enclosed with this letter a copy of Chief Judge Edmondson's August 28, 2003 letter to Judge Brill regarding the Adverse Personnel Action hearing.

[Pet.'s Note: In looking at the whole picture, the totality of facts, all anti-discrimination allegations regarding this case, and considering how the 2002 EDR complaint was processed and dismissed, Petitioner firmly believes impartial and prejudicial adjudication of this case in the Eleventh Circuit. Furthermore, the referenced letters to this Appendix, Robert Phelps, Court EDR Coordinator, actions, and Judge Edmondson's August 28, 2003, letter to Judge Brill were attempts to coerce Judge Brill in rendering



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her final decision regarding this case.].

As you should know, the purpose and procedures of the EDR Plan are substantially different from that of the Court's Adverse Action policy. For example, discovery is available prior to an EDR hearing, but not for an Adverse Personnel Action hearing. In addition, the purpose of an Adverse Action hearing is to require the court employer to demonstrate good cause before it may take an adverse employment action against an employee. In contrast, the purpose of an EDR hearing is to permit an employee to prove that the court employer has violated the employee's rights to equal employment opportunity, to FMLA leave, to a safe workplace, etc.

However, in compliance with the suggestion that you and the Chief Judge appeared to be making, Ms. Johnson filed an EDR Complaint requesting a hearing and moved for it be consolidated with the Adverse Personnel Action hearing. Although Judge Brill has denied the Motion to Consolidate, we have not received a response from Chief Judge Edmondson regarding Ms. Johnson's EDR Complaint hearing request. If further action on Ms. Johnson's part is required for her to obtain a hearing on her EDR claims, we hereby request that you provide further instruction.

Please do not hesitate to contact me if you have any questions.

Very truly yours,

MELVILLE JOHNSON, P.C.

/s/ Dawn M. Rivera

Attorney at Law

DMR:me

Enclosure

cc: Ms. Evelyn Johnson

**APPENDIX — 3-B**

**UNITED STATES COURT OF APPEALS  
ELEVENTH CIRCUIT**

---

Room 416, 56 Forsyth Street  
Atlanta, Georgia 30303

**J. L. EDMONDSON**  
Chief Judge

28 August 2003

Honorable Gerrilyn G. Brill  
United States Magistrate Judge  
United States District Court  
1690 Richard B. Russell Federal Building  
75 Spring Street, S.W.  
Atlanta, Georgia 30303-3361

Dear Judge Brill:

In connection with the request for adverse action hearing by an employee of this Court's Staff Attorneys' Office, and in furtherance of my designation to you on 30-June 2003, I understand that a hearing has been now scheduled for 25 September 2003. In addition to the other issues in controversy, I ask you - if it is feasible for you to do so - to consider and to make findings on whether Ms. Johnson's request, complaint or other document setting out her claim for a hearing was filed or pursued frivolously or maliciously or whether knowingly false information was presented at any point in these proceedings. I also ask that you examine and make findings of fact on the issue of whether this request for adverse action hearing requested by the employee was filed to harass or to undermine good management or discipline by a supervisor or within an office. I, of course, intimate nothing about the correct resolution of these issues.

**APPENDIX — 3-B**

I appreciate your undertaking to hear this matter.

Faithfully yours,

/s/ Larry

J. L. Edmondson

Chief of the Eleventh

Copy:

Mr. Jeffrey O. Bramlett, Esq.

Ms. Naomi Godfrey, Esq.

Ms. Evelyn Johnson

Ms. Mattie P. Johnson, Esq.

APPENDIX — 3-B

UNITED STATES COURT OF APPEALS  
ELEVENTH JUDICIAL CIRCUIT  
56 Forsyth St., N.W.  
Atlanta, Georgia 30303

Robert Phelps  
Chief Deputy Clerk

August 18, 2003

Evelyn Johnson  
6241S. Skyline Drive  
Douglasville, Georgia 30135

Dear Ms. Johnson:

Having not heard from you or your representative since facsimile receipt of your July 16, 2003, complaint, I am closing this file without action. The thirty-day time frame for consultation and resolution of this complaint has passed without any contact by you or your representative, or a signed waiver form. I conclude that you are pursuing other avenues.

If you have any questions or require further information, please feel free to write or call at your convenience.

Sincerely,

/s/ Robert Phelps  
Robert Phelps  
Chief Deputy Clerk

cc: Mattie P. Johnson, Esq.  
File

APPENDIX — 3-B

UNITED STATES COURT OF APPEALS  
ELEVENTH JUDICIAL CIRCUIT

56 Forsyth St., N.W.  
Atlanta, Georgia 30303

Robert Phelps  
Chief Deputy Clerk

July 22, 2003

Evelyn Johnson  
6241S. Skyline Drive  
Douglasville, Georgia 30135

RE: Complaint and Request for Consultation

Dear Ms. Johnson:

I acknowledge receipt of the document you sent me by facsimile on July 16, 2003, labeled "Complaint and Request for Consultation." Before I am able to act further on this matter, I request that you consider and then, if you so decide, file with me a "Waiver of Confidentiality," on the attached form. At this point I do not know if it will be appropriate to continue processing your request under the Court's Employment Dispute Resolution (EDR) Plan, but before I am able to do anything to assist with the issue you raise, including possible contact with the chief judge, I will need to have a waiver from you for me to begin contacting the appropriate persons.

Sincerely,

/s/ Robert Phelps  
Robert Phelps  
EDR Coordinator

## APPENDIX — 3-B

Appeal file

[Pet.'s Note: The issue here was the untimely return of the waiver form. While Phelps contended he furnished a copy of the form to Petitioner's counsel, Mattie P. Johnson at the time, and whose practice is in Washington, D.C., Phelps failed to copy this letter to Mattie P. Johnson. This letter was addressed to Petitioner although Petitioner specifically stated on the court personnel Exh. D1, Complaint and Request for Consultation, Petitioner faxed to Phelps on July 17, 2003, Petitioner asked to "refer all inquiries to the retained counsel." (See Appendix 16-A, Fax transmittal addressed to Phelps.).

APPENDIX — 4-B

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October 27, 2003

**VIA HAND DELIVERY  
& FIRST CLASS MAIL**

Chief Judge J. L. Edmondson  
United States Court of Appeals  
for the Eleventh Circuit  
Northern District of Georgia  
56 Forsyth Street, N.W.  
Atlanta, GA 30303

Re: Evelyn Johnson v. Staff Attorneys' Office, U.S. Court Of  
Appeals for the Eleventh Circuit

Dear Chief Judge Edmondson:

Enclosed please find *Complainant's Complaint Under  
Employment Dispute Resolution Plan, Motion to Consolidate  
& Motion to Clarify the Issues to Be Determined and  
Memorandum of Law in Support Thereof*. Thank you very  
much for your attention to this matter. If you have any  
questions, please do not hesitate to call.

Very Truly Yours,  
MELVILLE JOHNSON, P.C.  
/s/ Dawn M. Rivera, Esq.

DMR:me  
Enclosure



APPENDIX — 5-B

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
1690 U.S. Courthouse Building  
75 Spring Street, S.W.  
ATLANTA, GEORGIA 30303-3361

Gerrilyn G. Brill                      TEL (404) 215-1365  
United States Magistrate Judge      FAX (404) 215-1564

October 14, 2003

Ms. Dawn M. Rivera  
Melville Johnson, P.C.  
44 Broad St., N.W.  
Suite 222, The Grant Building  
Atlanta, Georgia 30303

Mr. Ronan P. Doherty  
Mr. Jeffrey O. Bramlett  
Bondurant, Mixon & Elmore, LLP  
3900 One Atlantic Center  
1201 West Peachtree St., N.W.  
Atlanta, Georgia 30309

Re: Evelyn L. Johnson matter

Dear Ms. Rivera and Messrs. Doherty and Bramlett,

In response to Mr. Doherty's letter of October 10, 2003, Mr. Zoller may be excused from attending the October 29, 2003 hearing. His testimony may be deferred to a time that is convenient to all concerned.

Yours truly,

/s/ Gerrilyn G. Brill  
UNITED STATES MAGISTRATE JUDGE

cc: Mr. Norman E. Zoller      VIA FAX

**APPENDIX — 5-B**

**BONDURANT, MIXSON & ELMORE, LLP**

**Attorneys at Law**

**5900 One Atlantic Center**

**1201 West Peachtree Street, N.W.**

**Atlanta, Georgia 30309-3417**

**(404) 881-8100**

**Telecopier (404) 881-4111**

**October 10, 2003**

**Honorable Gerrilyn G. Brill,  
U.S. Magistrate Judge  
U.S. District Court for the Northern District of Georgia  
1690 U.S. Courthouse Building  
75 Spring Street, S.W.  
Atlanta, Georgia 30303-3309**

**Re: Ms Evelyn L. Johnson's Hearing**

**Dear Judge Brill:**

As you will recall, the Staff Attorneys' Office for the U.S. Court of Appeals for the Eleventh Circuit (the "SAO") and Ms. Johnson had agreed to identify potential witnesses upon whose testimony they might rely at the hearing on Ms. Evelyn Johnson's termination, scheduled for October 29, 2003. At the Court's direction, Ms. Johnson served her witness list upon counsel for the SAO on September 26, 2003 (copy enclosed as Exhibit A). In addition to listing herself, Ms. Johnson's list identifies three witnesses. The SAO has confirmed that two of these witnesses, Ms. Godfrey and Ms. Gilibert, will be able to attend the hearing.

Ms. Johnson's witness list, however, also identifies Norman Zoller, Circuit Executive for the U. S. Court of Appeals for the Eleventh Circuit, as a potential witness. Mr. Zoller has informed counsel for the SAO that his duties for the Court of Appeals will require him to travel away from

## APPENDIX — 5-B

Atlanta on October 29-30, 2003 and thereby render him unavailable to testify at the October 29 hearing. Accordingly, Mr. Zoller has requested that the SAO petition the Court to excuse his appearance at the hearing or at least defer his testimony. For the Court's convenience, I have enclosed a true and correct copy of Mr. Zoller's letter request hereto as Exhibit B.

Mr. Zoller's testimony can have little or no relevance to the sole issue before the Court on October 29, namely whether the SAO's DECISION TO TERMINATE Ms. Johnson "is totally without merit." See Eleventh Circuit Personnel Manual Appendix No. 2. As Mr. Zoller's letter explains, Ms. Johnson has never worked for the Circuit Executive's Office or under Mr. Zoller's direct supervision. Indeed, the only mention of Mr. Zoller in the documents that the parties have identified and exchanged to prepare for Ms. Johnson's hearing appears in an exchange of e-mails regarding the Eleventh Circuit policies regarding employees' use of computers (copy enclosed as Exhibit C). Unless Ms. Johnson denies sending these messages to Mr. Zoller (and the other recipients listed) or receiving Mr. Zoller's replies, the SAO can envision no topic on which Mr. Zoller's testimony would be relevant to the October 29 hearing. Accordingly, the SAO respectfully requests the Court to excuse Mr. Zoller from attending the hearing on Ms. Johnson's termination.

I have contacted Ms. Johnson's counsel to determine whether Ms. Johnson oppose this request. Although Ms. Johnson's counsel cannot predict with any particularity what light Mr. Zoller's testimony might shed on these proceedings, Ms. Johnson is not willing to forego that testimony. Ms. Johnson, would, however, be amenable to deferring Mr. Zoller's testimony until he returns to town.

Please let me know if you require any further information from the Staff Attorneys' Office on this matter.

## APPENDIX — 5-B

Respectfully submitted,

/s/ Ronan P. Doherty  
Ronan P. Doherty

### Enclosures

cc: Norman E. Zoller (w/encl.)  
Naomi G. Godfrey, Esq. (w/encl.)  
Sara L. Gilibert, Esq. (w/encl.)  
Jeffrey O. Bramlett, Esq. (w/encl.)  
Dawn M. Rivera, Esq. (w/encl.)

APPENDIX — 5-B

UNITED STATES COURT OF APPEALS  
ELEVENTH CIRCUIT

Norman E. Zoller  
Circuit Executive

56 Forsyth Street, N.W.  
Atlanta, Georgia 30303  
404/335-6535

October 9, 2003

Mr. Ronan P. Doherty  
Bondurant, Mixson & Elmore, LLP  
3900 One Atlantic Center  
1201 West Peachtree Street, N.W.  
Atlanta, Georgia 30309-3417

Dear Mr. Doherty:

I acknowledge receipt of your letter of September 30, 2003, concerning a hearing scheduled on October 29, 2003 in a personnel matter involving Evelyn Johnson. As I reported to you, I am scheduled to attend and take substantive part in a scheduled administrative meeting of the Court of Appeals at 10:00 a.m. on Thursday, October 30, 2003, in Mobile, Alabama. Because of required set-up for this meeting (I need to depart for Mobile in the morning of October 29) and logistics arrangements supporting a portrait ceremony honoring Judge Emmett Cox at 3:30 p.m. also on October 30, I respectfully request delay or excuse from my attendance on October 29.

I expect to return from Mobile either late on October 30 or early October 31. If it is believed I can add to the substance of this hearing preferably not sooner than on October 31, of course, I will faithfully attend. As I think you know, Ms. Johnson has never worked in this office nor for me personally in any capacity.

Sincerely,  
/s/ Norman E. Zoller  
Circuit Executive

c: Naomi Godfrey  
Jeffrey Bramlett

APPENDIX — 6-B

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October 8, 2003

**VIA FIRST CLASS MAIL**

Ronan P. Doherty

Bondurant, Mixson & Elmore, LLP

3900 One Atlantic Center

1201 West Peachtree Street, N.W.

Atlanta, Georgia 30309-3417

Re: Evelyn Johnson v. Staff Attorney's Office, U.S. Court of Appeals for the Eleventh Circuit

Dear Mr. Doherty:

As you know, this firm represents Ms. Johnson in her claims of prohibited personnel practices and wrongful termination against the Staff Attorneys' Office of the U.S. Court of Appeals for the Eleventh Circuit. Pursuant to this representation, we hereby request a copy of Ms. Johnson's entire personnel file, including all materials maintained in Atlanta and in other location(s). In addition, we request a copy of the Computer Security and Automation Users Guide and any other statement(s) of computer usage policies and guidelines utilized in the Staff Attorneys' Office.

Thank you for your cooperation in this matter. If you have any questions, please do not hesitate to call.

Very Truly Yours,  
MELVILLE JOHNSON, P.C.  
/s/ Dawn M. Rivera, Esq.

DMR:me

cc: Ms. Evelyn Johnson

APPENDIX — 7-B

UNITED STATES COURT OF APPEALS  
ELEVENTH JUDICIAL CIRCUIT  
56 Forsyth St., N.W.  
Atlanta, Georgia 30303

Robert Phelps  
Chief Deputy Clerk

September 22, 2003

Dawn M. Rivera, Esq.  
Melville Johnson P.C.  
44 Broad Street, N.W.  
Suite 222, The Grant Building  
Atlanta, GA 30303

RE: Complaint and Request for Consultation - Evelyn  
Johnson

Dear Ms. Rivera:

I have your letter of September 5, 2003, and its accompanying waiver of confidentiality signed by Ms. Evelyn Johnson of September 2, 2003. Based on the Court's rule for the processing of such matters, the time for conducting a consultation expired on August 18, 2003, as I advised on August 29, 2003. Accordingly, I am without authority to proceed further on this matter.

I understand that an adverse action hearing has been scheduled before Magistrate Judge Gerrilyn Brill for September 25, 2003 at 9:00 a.m. on matters related to issues Ms. Johnson has raised, in accordance with this court's Adverse Personnel Action Policy. Also enclosed for your information is a copy of the letter of August 28, 2003, from Chief Judge Edmondson.



## APPENDIX — 7-B

If you have any questions require further information,  
please feel free to write or call at your convenience.

Sincerely,

/s/ Robert Phelps  
EDR Coordinator

c: The Honorable J. L. Edmondson  
Naomi Godfrey  
The Honorable Gerrilyn G. Brill  
Mattie P. Johnson  
Jeffrey O. Bramlett, Esq.  
Evelyn Johnson  
File

APPENDIX — 7-B

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA

1690 U.S. Courthouse Building

75 Spring Street, S.W.

ATLANTA, GEORGIA 30303-3361

TEL (404) 215-1365

FAX (404) 215-1564

Gerrilyn G. Brill  
United States Magistrate Judge

September 15, 2003

Ms. Dawn M. Rivera  
Melville Johnson, P.C.  
44 Broad St., N.W. Suite 222  
The Grant Building  
Atlanta, Georgia 30303

Mr. Ronan P. Doherty  
Mr. Jeffrey O. Bramlett  
3900 One Atlantic Center  
Bondurant, Mixon & Elmore, LLP  
1201 West Peachtree St., N.W.  
Atlanta, Georgia 30309

Re: Evelyn L. Johnson matter

Dear Ms. Rivera and Mssrs. Doherty and Bramlett:

This will confirm that the hearing in the above-styled matter has been rescheduled for Wednesday, October 29, 2003 at 9:30 a.m. The hearing will be held in Courtroom #2 on the 16<sup>th</sup> Floor of the Richard Russell Federal Building, 75 Spring St., S.W., Atlanta, Georgia 30303.

**APPENDIX — 7-B**

Pursuant to the parties' agreement, Ms. Rivera will provide Mr. Bramlett with copies of all documents she intends to use at the hearing no later than September 26, 2003.

Yours truly,

/s/ Gerrilyn G. Brill

**GERRILYN G. BRILL**

**UNITED STATES MAGISTRATE JUDGE**

cc: Ms. Naomi Godfrey Via Fax  
Mr. Norman E. Zoller Via FAX

**APPENDIX — 7-B**

**MELVILLE JOHNSON, P. C.**  
44 Broad Street, N.W.  
Suite 222, The Grant Building  
Atlanta, Georgia 30303  
Telephone (404) 524-9111  
FAX (404) 524-6611  
email [info@melvillejohnson.com](mailto:info@melvillejohnson.com)  
[www.melvillejohnson.com](http://www.melvillejohnson.com)

September 12, 2003

**VIA FIRST CLASS MAIL**

Mr. Robert Phelps  
EDR Coordinator & Chief Deputy Clerk  
U. S. Court of Appeals  
Eleventh Judicial Circuit  
56 Forsyth Street, N.W.  
Atlanta, GA 30303

Re: Evelyn Johnson v. U.S. Court of Appeals for the  
Eleventh Circuit

Dear Mr. Phelps:

As you may recall, we previously requested, on behalf of Ms. Johnson, a copy of the three types of procedures for court employees to address their employment action concerns. Although you have not responded to our requests, we have obtained a copy of the Personnel Manual of the Court from the Staff Attorney's Office counsel. This document appears to include the procedures for the EDR process, as well as a form for requesting the second phase of the EDR process, Mediation.

In our letter dated September 5, 2003, we also requested clarification of how you intend to proceed with Ms.

**APPENDIX — 7-B**

Johnson's EDR claim. Please find enclosed a completed Request for EDR Mediation, if it is your intent to end the Consultation phase without having consulted with Ms. Johnson.

Thank you for your cooperation in this matter. Please do not hesitate to contact me if you have any questions.

Very truly yours,

MELVILLE JOHNSON, P.C.

/s/ Dawn M Rivera  
Attorney at Law

DMR:me

Enclosure

APPENDIX — 7-B

UNITED STATES COURT OF APPEALS  
ELEVENTH JUDICIAL CIRCUIT  
56 Forsyth St., N.W.  
Atlanta, Georgia 30303

Robert Phelps  
Chief Deputy Clerk

September 9, 2003

Dawn M. Rivera, Esq.  
Melville Johnson P.C.  
44 Broad Street, N.W.  
Suite 222, The Grant Building  
Atlanta, GA 30303

RE: Complaint and Request for Consultation - Evelyn  
Johnson

Dear Ms. Rivera:

As previously discussed, enclosed for your information are copies of this court's EDR plan, adverse action plan, and grievance procedures. If you have any questions or require further information, please feel free to write or call at your convenience.

Sincerely,

/s/ Robert Phelps  
EDR Coordinator

**APPENDIX — 7-B**

**MELVILLE JOHNSON, P. C.**  
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[www.melvillejohnson.com](http://www.melvillejohnson.com)

September 8, 2003

**VIA FIRST CLASS MAIL**

Mr. Ronan P. Doherty  
Mr. Jeffery O. Bramlett  
Bondurant, Mixson & Elmore, LLP  
3900 One Atlantic Center  
1201 West Peachtree Street, N.W.  
Atlanta, Georgia 30309-3417

Re: Evelyn Johnson's Adverse Personnel Action  
Hearing

Dear Mr. Doherty:

Please be advised that this firm represents Ms. Evelyn Johnson with regard to her Request for a Hearing pursuant to the Adverse Personnel Action Policy of the United States Court of Appeals for the Eleventh Circuit. Please address all notices, orders, correspondence and/or questions that you may have for Ms. Johnson to the undersigned.

As indicated by the enclosed letter, we have requested a continuance of the hearing that is currently scheduled for September 25, 2003. In addition, Ms. Johnson advises us that her previous attorney, Ms. Mattie Johnson, has not yet received the materials which were to be provided by your client pursuant to the conference with Magistrate Brill. Please provide to us the documents discussed in Mattie



APPENDIX — 7-B

Johnson's letter of August 15, 2003, at your earliest convenience.

Thank you for your cooperation in this matter. Please do not hesitate to contact me if you have any questions.

Very truly yours,

MELVILLE JOHNSON, P.C.

/s/ Dawn M. Rivera, Esq.  
Dawn M. Rivera, Esq.  
Attorney at Law

DMR:me

cc: Evelyn Johnson

**APPENDIX -- 7-B**

**MELVILLE JOHNSON, P. C.**  
44 Broad Street, N.W.  
Suite 222, The Grant Building  
Atlanta, Georgia 30303  
Telephone (404) 524-9111  
FAX (404) 524-6611

email [info@melvillejohnson.com](mailto:info@melvillejohnson.com) [www.melvillejohnson.com](http://www.melvillejohnson.com)

September 5, 2003

**VIA FIRST CLASS MAIL**

Mr. Robert Phelps  
EDR Coordinator & Chief Deputy Clerk  
U. S. Court of Appeals  
Eleventh Judicial Circuit  
56 Forsyth Street, N.W.  
Atlanta, GA 30303

Re: Evelyn Johnson v. U.S. Court of Appeals for the  
Eleventh Circuit

Dear Mr. Phelps:

This letter is written in response to your letter of August 29, 2003, in which you stated the time for the Consultation phase of the EDR process has expired without any action by Ms. Johnson. I am baffled by this assertion, which appears to suggest that Ms. Johnson had some obligation to schedule consultations with the individuals who terminated her employment after filing her EDR claim. Certainly coordinating such meetings would appear to be the responsibility of the EDR Coordinator, not the Complainant.

Further, the EDR Plan does not stipulate that Ms. Johnson was required to take any action beyond filing her claim with you, and you advised me that your only communication to Ms. Johnson was to request that she sign a Waiver of Confidentiality, which is enclosed herein. If you

## APPENDIX — 7-B

intended for Ms. Johnson to take some additional action to begin the Consultation phase of the EDR process, it would appear that you have failed to articulate what that action might be. Nevertheless, since Ms. Johnson intends to continue pursuing her EDR claim, please advise as to how you intend to proceed.

In addition, when we spoke on the telephone, you advised me that you could provide a copy of the three types of procedures for court employees to address their employment action concerns. As you are well aware, Ms. Johnson had obtained legal assistance from an attorney in Washington, D.C., prior to our representation of her. Since time is quite obviously of the essence in these matters, we would prefer to obtain these procedures from your office, rather than wait for files to arrive from Washington, D.C. Therefore, we hereby renew our request for copies of materials explaining the EDR Plan, the Adverse Personnel Action Policy and the Grievance procedures.

Thank you for your cooperation in this matter. Please do not hesitate to contact me if you have any questions.

Very truly yours,

MELVILLE JOHNSON, P.C.

/s/ Dawn M. Rivera, Esq.  
Dawn M. Rivera, Esq.  
Attorney at Law

DMR:me

cc: Evelyn Johnson

APPENDIX — 7-B

UNITED STATES COURT OF APPEALS  
ELEVENTH JUDICIAL CIRCUIT  
56 Forsyth St., N.W.  
Atlanta, Georgia 30303

Robert Phelps, Chief Deputy Clerk

August 29, 2003

Dawn M. Rivera, Esq.  
Melville Johnson P.C.  
44 Broad Street, N.W.  
Suite 222, The Grant Building  
Atlanta, GA 30303

RE: Complaint and Request for Consultation - Evelyn  
Johnson

Dear Ms. Rivera:

Thank you for your letter of August 28, 2003, related to the request for consultation by Evelyn Johnson. This court's procedures clearly state that the consultation period shall not exceed thirty (30) days from receipt of the complaint, and that time frame has expired. Between the receipt of the request dated July 16, 2003, and your letter of August 28, 2003, there was no contact or communication from Ms. Johnson or her representative. Your client should have a copy of our Personnel Manual, which includes the Employee Dispute Resolution Procedures and the Adverse Personnel Action Policy for this court. Please feel free to call or write if you have any further questions.

Sincerely,  
/s/ Robert Phelps  
EDR Coordinator

c: The Honorable J. L. Edmondson  
Mattie Johnson

Evelyn Johnson  
file

**APPENDIX — 7-B**

**UNITED STATES COURT OF APPEALS  
ELEVENTH CIRCUIT**

---

Room 416, 56 Forsyth Street  
Atlanta, Georgia 30303

**J. L. EDMONDSON**  
Chief Judge

28 August 2003

Honorable Gerrilyn G. Brill  
United States Magistrate Judge  
United States District Court  
1690 Richard B. Russell Federal Building  
75 Spring Street, S.W.  
Atlanta, Georgia 30303-3361

Dear Judge Brill:

In connection with the request for adverse action hearing by an employee of this Court's Staff Attorneys' Office, and in furtherance of my designation to you on 30-June 2003, I understand that a hearing has been now scheduled for 25 September 2003. In addition to the other issues in controversy, I ask you - if it is feasible for you to do so - to consider and to make findings on whether Ms. Johnson's request, complaint or other document setting out her claim for a hearing was filed or pursued frivolously or maliciously or whether knowingly false information was presented at any point in these proceedings. I also ask that you examine and make findings of fact on the issue of whether this request for adverse action hearing requested by the employee was filed to harass or to undermine good management or discipline by a supervisor or within an office. I, of course, intimate nothing about the correct resolution of these issues.

I appreciate your undertaking to hear this matter.

**APPENDIX — 7-B**

**Faithfully yours,**

/s/ Larry

**J. L. Edmondson**

**Chief of the Eleventh**

**Copy:**

**Mr. Jeffrey O. Bramlett, Esq.**

**Ms. Naomi Godfrey, Esq.**

**Ms. Evelyn Johnson**

**Ms. Mattie P. Johnson, Esq**

APPENDIX — 7-B

MELVILLE JOHNSON, P.C.  
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Telephone (404) 524-9111  
Fax (404) 524-6611  
email [info@melvillejohnson.com](mailto:info@melvillejohnson.com)  
[www.melvillejohnson.com](http://www.melvillejohnson.com)

August 28, 2003

Mr. Robert Phelps, EDR Coordinator  
U.S. Court of Appeals  
Eleventh Judicial Circuit  
56 Forsyth Street, N.W.  
Atlanta, GA 30303

Re: Evelyn Johnson v. U.S. Court of Appeals for the  
Eleventh Circuit

Dear Mr. Phelps:

Please be advised that this firm represents Ms. Evelyn Johnson with regard to the Complaint and Request for Consultation she filed with the Court's Employment Dispute Resolution ("EDR") Plan. Please address all correspondence and/or questions that you may have for Ms. Johnson to the undersigned.

In addition, Ms. Johnson has agreed to sign the "Waiver of Confidentiality" form that you enclosed in your letter of July 22, 2003, pursuant to her claim of retaliation. Upon our receipt of the executed form from Ms. Johnson, we will forward it to your office under separate cover. However, we note that waiving confidentiality is not a condition of participating in the EDR process. Therefore, contrary to your August 28, 2003, letter to Ms. Johnson, we anticipate that you will begin the Consultation phase of the EDR



**APPENDIX — 7-B**

Thank you for your cooperation in this matter, and we look forward to hearing from you. Please do not hesitate to contact me if you have any questions.

Very truly yours,

MELVILLE JOHNSON, P.C.

/s/ Dawn M. Rivera  
Attorney at Law

DMR:me

Enclosures

cc: Ms. Evelyn Johnson

APPENDIX — 8-B

**LAW OFFICE OF M. P. JOHNSON  
ATTORNEY AT LAW**

Woodward Building  
733 15<sup>TH</sup> Street, NW, Suite 700  
Washington, D.C. 20005

Phone: (202) 628-3498  
Fax: (202) 347-3931

July 29, 2003

Evelyn L. Johnson  
6241 South Skyline Drive  
Douglasville, Georgia 30135

**RE: Evelyn L. Johnson's Request for Hearing**

Dear Ms. Johnson:

The enclosure is a letter dated July 23, 2003, from United States Magistrate Gerrilyn G. Brill.

Please be advised that the Hearing, in your case, has been rescheduled for Thursday, September 24, 2003, at 9:30 a.m. at the Richard Russell Federal Building, 75 Spring Street, S.W., 16<sup>th</sup> Floor, Atlanta, Georgia 30303 in Courtroom #2. (A copy of the letter is enclosed).

If you have any questions, please do not hesitate to contact me.

Sincerely,

/s/ Mattie P. Johnson  
Mattie P. Johnson

Enclosure

mag

**APPENDIX — 9-B**

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
1690 U.S. Courthouse Building  
75 Spring Street, S.W.  
ATLANTA, GEORGIA 30303-3361**

**Gerrilyn G. Brill  
United States  
Magistrate Judge**

**TEL (404) 215-1365  
FAX (404) 215-1564**

**July 23, 2003**

**Ms. Mattie P. Johnson  
Woodward Building  
733 5<sup>th</sup> St., NW, Suite 700  
Washington, D.C. 20005**

**Mr. Ronan P. Doherty  
Mr. Jeffrey O. Bramlett  
Bondurant, Mixon & Elmore, LLP  
3900 One Atlantic Center  
1201 West Peachtree St., N.W.  
Atlanta, Georgia 30309**

**Re: Evelyn L. Johnson's Request for Hearing**

**Dear Ms. Johnson and Mssrs. Doherty and Bramlett:**

**This will confirm that the hearing in the above-styled matter has been rescheduled for Thursday, September 25, 2003 at 9:30 a.m. If necessary, the hearing may carry over into Friday, September 26. The hearing will be held in Courtroom #2 on the 16<sup>th</sup> Floor of the Richard Russell Federal Building, 75 Spring St., S.W., Atlanta, Georgia 30303.**

**A status conference will be held in this case on August 13, 2003 at 10:00 a.m., with all parties participating**

**APPENDIX — 9-B**

by telephone. The parties should follow the same procedure for the call that was used this morning (i.e., having all parties on the line before contacting the Court). Prior to August 13, the parties should meet to discuss the framework for the hearing.

Very truly yours,

/s/ Gerrilyn G. Brill

GERRILYN G. BRILL

UNITED STATES MAGISTRATE JUDGE

APPENDIX 10-B

UNITED STATES COURT OF APPEALS  
ELEVENTH CIRCUIT  
STAFF ATTORNEYS' OFFICE  
56 Forsyth Street, N.W.  
Atlanta, Georgia 30303-2289

July 10, 2003

VIA U.S. MAIL

Ms. Evelyn Johnson  
6241 S. Skyline Drive  
Douglasville, Georgia 30135

Dear Ms. Johnson:

On June 20, 2003, I informed you of my intention to terminate you from employment with the Staff Attorneys' Office to be effective June 27, 2003. Thereafter, at the request of Chief Judge Edmondson and on my telephone instructions (due to my absence from Atlanta in Florida because of the death of my brother), Mori Irvine wrote to you and your then attorney, Wayne Marcus Scriven, on July 1, 2003, informing you that at the request of Chief Judge Edmondson, your employment would be extended until July 11, 2003. She also informed you that in order for you to be paid for this additional period of employment you must report to work on Wednesday, July 2, 2003. You have not been at work in this office since June 20, 2003.

On June 26, 2003, your requested Chief Judge Edmondson to conduct a full hearing on the decision to terminate your employment.

In light of your request for a hearing to be conducted under the Court's Adverse Action Policy, I am extending you on the payroll of the Staff Attorneys' Office in a status of leave- without-pay effective July 2, 2003, unless you request that you be placed on annual leave or sick leave (the latter to be accompanied with appropriate medical justification). This status on leave will continue until the adverse action hearing

## APPENDIX 10-B

process has been completed or unless you decide to resign or retire, if eligible; or unless the Chief Judge or the Court otherwise directs.

Requests for annual leave or sick leave may be submitted to Sara Gilibert by you in the usual manner with which you are familiar.

We understand from your previous attorney, Wayne Marcus Scriven, that you are now a resident of the State of Virginia, and hereby request that you provide to us your current mailing address as soon as possible. In the interim, this letter is being mailed to your last known address.

Sincerely,

/s/ Naomi G. Godfrey  
Naomi G. Godfrey  
Senior Staff Attorney

c: The Honorable J.L. Edmondson - Via Fax  
Mattie P. Johnson, Esq. - Via Fax  
& U.S. Mail  
Norman E. Zoller - Via Fax

**APPENDIX 10-B**

**LAW OFFICE OF M. P. JOHNSON**

Attorney at Law  
Woodward Building  
733 15<sup>th</sup> Street, NW, Suite 700  
Washington, D.C. 20005  
Phone (202) 628-3498  
Fax (202) 347-3931

July 2, 2003

**Transmitted by facsimile and regular mail**

Mori Irvine  
Judicial Division Manager  
56 Forsyth Street, N.W.  
Atlanta, Georgia 30303-2289

**RE: Evelyn L. Johnson**

Dear Ms. Irvine:

Please be advised that my office represent[s] Ms. Evelyn L. Johnson. Therefore, please direct all further correspondence concerning Ms. Johnson's employment matter to my office at the Law Office of M.P. Johnson, Woodward Building, 733 15<sup>th</sup> Street, NW, Suite 700, Washington, D.C. 20005.

In addition, I am in receipt of your July 1, 2003, letter to Ms. Johnson. It is not clear whether your July 1, 2003, letter is rescinding Ms. Johnson's June 20, 2003, termination, which was effective on June 27, 2003, or is it inviting her to return to work to be terminated again on July 11, 2003. Given, the June 20, 2003, termination devastating impact on Ms. Johnson's emotional and physical health, it is not advisable for her to return to work for ten (10) days to be subjected to a second termination.

Furthermore, I am concerned for Ms. Johnson, whose termination from federal service was effective June 27, 2003,



## APPENDIX 10-B

to enter into non-public areas of a federal building without the signed authorization from the person with the authority to rescind her termination. If you have questions, please do not hesitate to contact me at (202) 628-3498.

Sincerely,

/s/ Mattie P. Johnson, Esq.  
Mattie P. Johnson, Esq.

c: Honorable J.L.E.  
NEZ

APPENDIX 10-B

UNITED STATES COURT OF APPEALS  
ELEVENTH CIRCUIT  
STAFF ATTORNEYS' OFFICE  
56 Forsyth Street, N.W.  
Atlanta, Georgia 30303-2289

July 1, 2003

VIA U.S. MAIL

Ms. Evelyn Johnson  
6241 S. Skyline Drive  
Douglasville, Georgia 30135  
Dear Ms. Johnson:

Ms. Godfrey was called away from the office on emergency leave this past Thursday to Florida due to the illness and death (on Saturday) of her brother. In her absence, she asked that I contact you. She advises me that acting on a request from Chief Judge Edmondson, she has extended the time of your employment until July 11, 2003, so that further review of this matter may be undertaken. However, in order for you to be paid for this additional period of employment, you must report to work at the usual time on Wednesday, July 2, 2003.

If you have any questions, please feel free to contact me.

Very truly yours,  
/s/ Mori Irvine  
Mori Irvine  
Judicial Division Manager

c: The Honorable J.L. Edmondson - Via Fax  
Mr. Wayne Marcus Scriven - Via Fax & U.S. Mail  
Mr. Norman E. Zoller - Via Fax

**APPENDIX 10-B**

**UNITED STATES COURT OF APPEALS  
ELEVENTH CIRCUIT  
STAFF ATTORNEYS' OFFICE  
56 Forsyth Street, N.W.  
Atlanta, Georgia 30303-2289**

June 20, 2003

**VIA U.S. MAIL**

**Ms. Evelyn Johnson  
6241 S. Skyline Drive  
Douglasville, Georgia 30135**

**Dear Ms. Johnson:**

I write to inform you that you that you are terminated from the Staff Attorneys' Office. This action has become necessary because of your insubordinate behavior, unsatisfactory work, and inappropriate conduct in the discharge of your responsibilities. I am mindful of your years of service to the court and this office and I take this action only after extremely careful consideration and due reflection. This decision is based on the recommendation of your immediate supervisor, the reports of others, and my personal observations of your conduct and performance.

Although you have been given every consideration, your work performance over the last year has been unacceptable. Since January 21, 2002, when Sara Gilibert began work in the office and became your immediate supervisor, your performance has been unsatisfactory and continues to decline. She has repeatedly advised you to correct your performance deficiencies and tried to enlist your support in performing the personnel duties of the office. Despite Ms. Gilibert's best efforts, your continued failure to follow her directives, your insubordination to her, your failure to satisfactorily to [sic] perform your assigned duties, and your refusal to communicate with her and other

## APPENDIX 10-B

administrative staff have resulted in inefficient operations in this office. You have been repeatedly counseled, admonished, and warned that such conduct will not be tolerated and will result in disciplinary action if not corrected. Yet, you continue to fail to carry out your assignments and responsibilities or to work with Sara Gilibert in a satisfactory manner.

Because of these continuous unacceptable actions and behavior, you will no longer be accorded the privilege to work for the court and this office. The situation has become one that this office institutionally will not tolerate. Accordingly, and as a result of your unacceptable performance, you are hereby terminated from your position with the Staff Attorneys' Office. This termination will be effective June 27, 2003, at the close of business. Under the authority of the Court's Adverse Action Plan and with the Court's approval, I am placing you immediately in a nonduty status with pay through June 27, 2003. As an alternative, I will accept your resignation effective on or before Friday, June 27, 2003, close of business.

Consistent with APPENDIX II of the Personnel Manual, you have the right to make a written request of the chief judge or his designee within 10 calendar days of the date of your receipt of this letter for a hearing. You also have the right to be represented at the hearing, to confront adverse witnesses, and to present evidence and arguments. If this action is vacated as a result of the hearing before the chief judge or his designee, you will be returned to your status prior to the action as if no action has been taken and all documents will be removed from the record.

I regret having to take this action and wish you every success in your future endeavors.

Sincerely,

/s/ Naomi G. Godfrey  
Senior Staff Attorney

## **APPENDIX 10-B**

**20 JUNE 2003**

### **NOTE TO FILE**

1. NAOMI GODFREY SENT ME AN EMAIL (COPY TO MORI IRVINE) STATING, "I NOTICED THAT YOU ARE LEAVING AT 1:30 P.M. TODAY (I HAVE DOCTORS' APPOINTMENTS). PLEASE COME TO MY OFFICE AT NOON TODAY FOR A CONFERENCE." I RESPONDED, "OKAY, I WILL BE THERE."
2. CAME TO NAOMI GODFREY'S OFFICE AT NOON TODAY. MORI IRVINE WAS ALREADY IN HER OFFICE. NAOMI GODFREY SAID, "COME IN SIT DOWN." RIGHT AWAY, NAOMI GODFREY CONCEDED THAT, "WE DECIDED TO TERMINATE YOU EFFECTIVE CLOSE-OF-BUSINESS OF JUNE 27, 2003." NAOMI GODFREY HANDED ME HER MEMO. I READ HER TWO-PAGE MEMO AND ASKED NAOMI GODFREY, "DOES THIS HAVE ANYTHING TO DO WITH MY COMPLAINT?" I LOOKED AT NAOMI GODFREY AND ALSO MORI IRVINE, WHO WAS STONE FACED. NAOMI GODFREY RESPONDED, "NO." MY RESPONSE WAS, "OKAY."
3. NAOMI GODFREY THEN ADDED THAT MY LAST DAY OF WORK WITH THAT OFFICE WAS TODAY, I WAS TO RETURN MY COURT ID AND KEY CARD, AND THAT BRIAN SCHUMACHER WAS TO ESCORT ME OUT OF THE BUILDING. FURTHER, NAOMI GODFREY TOLD ME TO CALL THE OFFICE NEXT WEEK TO SET UP AN APPOINTMENT TO CLEAR MY OFFICE.
4. I STOOD UP AND PROCEEDED TO MY OFFICE, FOLLOWED BY MORI IRVINE. MORI IRVINE STOOD UP IN FRONT OF MY DESK WHILE I REMOVED THE COURT ID AND KEY CARD FROM

## APPENDIX 10-B

### MY CAR-KEY HOLDER.

5. I GATHERED MY PURSE AND UMBRELLA AND PROCEEDED TO LEAVE, ESCORTED BY BRIAN SCHUMACHER INTO THE ELEVATOR TO THE FRONT DOOR OF THE BUILDING, AS IF I AM A CRIMINAL. I LEFT THE BUILDING WITHOUT SAYING ANYTHING TO BRIAN SCHUMACHER.
6. THE EFFECTIVE DATE OF MY TERMINATION, IF I WILL NOT RESIGN WILL BE JUNE 27, 2003. COINCIDENTALLY, THE FINAL COURT ORDERS ON MY COMPLAINT WERE ENTERED APRIL 24, 2003, BUT WERE NOT MAILED TO ME UNTIL APRIL 28, 2003. I RECEIVED THE COURT FINAL ORDERS ON APRIL 29, 2003. THIS TIMING OF 60 DAYS FROM THE TIME I RECEIVED THE TERMINATION LETTER, AMONG OTHER THINGS, COINCIDES WITH THE TIMINGS THROUGHOUT THE STAGES OF THE EDR PROCESS AND MY UPCOMING TERMINATION.
7. I INFERRED THE WHOLE STAGE WAS TO GET RID OF ME, SIXTY DAYS AFTER THE ENTRY OF THE COURT FINAL JUDGMENT DUE TO MY FILING OF THE EDR COMPLAINT. NOW THAT THE WHOLE PROCEEDINGS WERE DISMISSED, IT WAS MUCH EASIER FOR THE SAO TO FIRE ME. ADDITIONALLY, THE COURT WAS EXPERIENCING BUDGET CRUNCH, AND SEVERAL ATTORNEYS ARE UNHAPPY FOR NOT RECEIVING THEIR OVERDUE PROMOTIONS. MY TERMINATION WILL SAVE THE SAO HALF OF MY ANNUAL SALARY WHICH IS \$49,502 (JULY-DECEMBER 2003), AMOUNT THAT THE SAO COULD USE FOR THE ATTORNEYS' OVERDUE PROMOTIONS.

10



NO. 04-3452

Supreme Court, U.S.  
FILED

05-50902 8-10-05

IN THE SUPREME COURT  
OF THE UNITED STATES

In Re: Evelyn L. Johnson,

Petitioner.

ON PETITION  
FOR AN EXTRAORDINARY WRIT  
OF MANDAMUS  
AND/OR  
PROHIBITION  
APPENDIX

30 Aug 2005  
Date

*Evelyn L. Johnson*  
Evelyn L. Johnson  
Pro Se Petitioner  
6241 S. Skyline Drive  
Douglasville, GA 30135  
(770) 489-0343

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**APPENDIX — 1-C**

**UNITED STATES COURT OF APPEALS  
ELEVENTH JUDICIAL CIRCUIT  
56 Forsyth Street, N.W.  
Atlanta, Georgia 30303  
404/335-6535**

**Norman E. Zoller  
Circuit Executive**

**April 28, 2003**

**Ms. Naomi Godfrey, Esq.  
Senior Staff Attorney  
United States Court of Appeals  
Eleventh Circuit  
56 Forsyth Street, NW  
Atlanta, GA 30303**

**Ms. Evelyn Johnson  
6241 South Skyline Drive  
Douglasville, GA 30135**

**Re: Complaint of Evelyn Johnson**

**Dear Ms. Godfrey and Ms Johnson:**

**The following orders, each dated April 24, 2003, are enclosed:**

- Order AFFIRMING the November 14, 2002, decision of Magistrate Judge Janet F. King;**
- Order DENYING motions Ms. Johnson filed on or about April 3, 2003.**

**These orders conclude the Judicial Council's consideration of Ms. Johnson's Petition for Review. The Affirming Order is final and not subject to further review.**

**APPENDIX — 1-C**

The council will not consider any further submissions in connection with this Petition.

Best regards,

/s/ Virgil E. Alexander

Virgil E. Alexander

Assistant Circuit Executive

c:   The Honorable J.L. Edmondson  
      The Honorable Janet F. King  
      Mr. Norman E. Zoller  
      Mr. Jeffrey Bramlett, Esq

**APPENDIX — 1-C**

**FOR THE ELEVENTH CIRCUIT**

**JUDICIAL COUNCIL**

**GENERAL ORDER 2003-h**

**IN RE: PETITION FOR REVIEW**

**FILED BY EVELYN JOHNSON**

**EVELYN JOHNSON,**

**Petitioner,**

**v.**

**STAFF ATTORNEY'S OFFICE**

**UNITED STATES COURT OF APPEALS FOR THE**

**ELEVENTH CIRCUIT,**

**Respondent.**

**Before EDMONDSON, - Chief Judge, TJOFLAT,  
ANDERSON, BIRCH, DUBINA, BLACK, CARNES,  
BARKETT, HULL and MARCUS, Circuit Judges and  
ALBRITTON, BOWEN, CLEMON, VANS, FAWSETT,  
GRANDE, SANDS, VINSON, AND ZLOCH, Chief District  
Judges.**

## APPENDIX — 1-C

### ORDER

The members of the Judicial Council have considered the Petition for Review and Amended Petition for Review filed by Evelyn Johnson on 11 December 2002 and 24 January 2003, respectively, under authority of the provisions of the Eleventh Circuit Court of Appeals Employment Dispute Resolution Plan. In accordance with Chapter VIII, Section 1(D) of that Plan, with no Council member having voted to place this matter on the agenda of the next meeting of the Judicial Council, the decision of United States Magistrate Judge Janet F. King, entered on 14 November 2002, is AFFIRMED.

DONE at Atlanta, Georgia, on 24 April 2003.

FOR THE JUDICIAL COUNCIL

/s/ J.L. EDMONDSON  
Chief Judge